LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 13 1970
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 1551

TRANSPORTATION-COMMUNICATION DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Commonwealth Building
1625 K Street, N. W.
Washington, D. C. 20006

818 Olive Street
St. Louis, Missouri 63101

MILTON KRAMER

JOHN H. HALEY, JR.

Counsel for Petitioners

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

INDEX

	Page
Prayer	1
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement of the case	4
Reasons for granting the writ	7
I. This Case Involves an Important Question of Law Under the Railway Labor Act That Has Not Been But Should Be Decided by This Court, i. e., Whether a Judgment of a District Court Remanding an Award to an Adjustment Board, Permitted by the Recently Enacted Section 3 First (q) of the Railway Labor Act, Is an Appealable Decision	7
II. The Decision Below, Holding That a District Court Judgment Refusing to Enforce or Set Aside Adjustment Board Awards and Remanding the Dispute to the Board for Further Proceedings and Terminating the Case in the District Court, Is Not an Appealable Order, Is Unprecedented and Frustrates the Holding of This Court in the Gunther Case and Frustrates 1966 Amendment to the Railway Labor Act	10
III. The Decision Below Leaves Standing a Gross Misapplication of This Court's Decision in Transportation-Communication Employees Union v. Union Pacific R. Co., 385 U. S. 157 (1966)	12

IV. The Refusal of the Court of Appeals to Grant the Joint Motion of All the Parties to Vacate the Judgment of the District Court and to Remand With Directions to Dismiss as Moot Is in Conflict With the Long-Established Practice of This Court 14

Conclusion 16

Appendix A—Statutes involved A-1

Appendix B—Opinion of District Court A-6

Appendix C—Judgment of District Court A-15

Appendix D—Order denying motion to amend judgment A-16

Appendix E—Opinion of Court of Appeals and dissent A-17

Appendix F—Judgment of Court of Appeals A-22

Appendix G—Order of Court of Appeals denying motion for rehearing A-23

Cases Cited

American Federation of Musicians v. Wittstein, 379 U. S. 171 (1964) 8

Barnes v. Akron, C. & Y. R. Co., 348 U. S. 893 ..... 14, 15

Brotherhood of Locomotive Firemen v. Toledo, P. & W. R. Co., 332 U. S. 748 14

Brotherhood of Railroad Trainmen v. Illinois Central R. Co., 72 LRRM 2877, sub nom.; United Transportation Union v. Illinois Central Railroad No. 18,033 12

Brown Shoe Co. v. United States, 370 U. S. 294 (1962) 9

Duke Power Co. v. Greenwood County, 299 U. S. 259 14

Gillespie v. United States Steel Corp., 379 U. S. 148 (1964) 9

Gold v. Lomenzo, ... F. 2d ... (2d Cir., Jan. 22, 1970), 38 Law Week 2430 15
Gunther v. San Diego & Arizona Eastern Ry. Co., 382 U. S. 257 ..... 4, 10, 11
Hall v. Beals, U. S. Sup. Ct., Oct. Term, 1969, No. 39, 90 S. Ct. 200, 38 Law Week 4006 (Nov. 24, 1969) .. 14
Howard v. United States, 340 U. S. 898 14
Rothensies v. Electric Storage Battery Co., 329 U. S. 296 (1946) 8
Securities & Exchange Commission v. Harrison, 340 U. S. 908 14
Transportation-Communication Employees Union v. Union Pacific R. Co., 385 U. S. 385 ..... 3, 4, 5, 7, 12, 13
United States v. Munsingwear, Inc., 340 U. S. 36 14

Statutes Cited

28 U. S. C., § 1254(1) 2
28 U. S. C. A., § 1291 ..... 2, 3, 6, 7
28 U. S. C. A., § 1337 6
45 U. S. C. A., § 153 First (m) 4, 10
45 U. S. C. A., § 153 First (p) 2, 3, 4, 6, 7, 10
45 U. S. C. A., § 153 First (q) 2, 3, 4, 6, 7, 9
45 U. S. C. A., § 153 Second 3

Senate Report

Senate Report 1201 to accompany H. R. 706, 89th Cong. 2d Sess., p. 3 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. .....

TRANSPORTATION-COMMUNICATION DIVISION; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

The above-named petitioners pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this case on December 19, 1969, rehearing denied February 16, 1970.

OPINIONS BELOW

The opinion of the District Court (Appendix B) is reported at 296 F. Supp. 507 *sub nom.** *Transportation-Communication Employees Union v. St. Louis-San Francisco Railway Co.* The opinion of the Court of Appeals (Appendix E) is reported at 419 F. (2d) 933.

JURISDICTION

The original judgment of the Court of Appeals (Appendix F) was entered December 19, 1969. A Petition for Rehearing was denied February 16, 1970 (Appendix G). Jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1) and Section 3 First (q) of the Railway Labor Act (45 U. S. C., § 153 First (q)).

QUESTIONS PRESENTED

1. Whether, in a proceeding in a District Court under Section 3 First (q) of the Railway Labor Act (45 U. S. C. A., § 153 First (q)) to review and set aside certain awards of a Special Board of Adjustment established under Section 3 Second of that Act, and a counterclaim by the union under Section 3 First (p) of the Act to enforce those awards, in which proceeding the Court did not grant the motion of either party for summary judgment but on its own initiative entered a Judgment remanding the dispute to the Special Board to take further action, without the Court retaining jurisdiction, such judgment was appealable to the Court of Appeals under 28 U. S. C. A., § 1291 and Section 3 First (q) of the Railway Labor Act (45 U. S. C. A., § 3 First (q))?

---

* After the commencement of this action, the original plaintiff, Transportation-Communication Employees Union, merged with the Brotherhood and became the Transportation-Communication Division of the Brotherhood.

2. Whether, if after an appeal was taken from such judgment, and after oral argument but before decision in the Court of Appeals, the parties settled the underlying controversy and filed a joint suggestion of mootness and a joint motion in the Court of Appeals to vacate the judgment of the District Court and to remand the case to that Court for dismissal as moot, the Court of Appeals had jurisdiction to entertain such motion?

3. Whether, in a proceeding before a Special Board of Adjustment established under Section 3 Second of the Railway Labor Act, in which the Union claims the Railroad violated their collective bargaining agreement when it assigned certain work to employees in other crafts and the Railroad claims that no craft is entitled to perform such work, and no other union had claimed the right to perform such work, the decision of this Court in *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U. S. 157, requires the Board on its own initiative to take affirmative steps to determine whether any other union wants to claim that its craft is entitled to perform such work?

STATUTES INVOLVED

The provisions of Subsections 3 First (p) and (q) of the Railway Labor Act (45 U. S. C. A., § 3 First (p), (q)) and Subsection 3, Second of that Act (45 U. S. C. A., § 153 Second) and of 28 U. S. C. A., § 1291, are set forth in Appendix A).)

STATEMENT OF THE CASE

This case began with a complaint by the Petitioner ("Union") against the Respondent ("Railroad") on an unrelated matter (R. 133). The Railroad filed an answer to the complaint and a permissive counterclaim in the nature of a Petition for Review under Section 3 First (q) of the Railway Labor Act seeking to set aside certain awards of a Special Board of Adjustment (the "P. L. Board") established by the parties under the second paragraph of Section 3 Second of the Act (R. 5). The parties settled their dispute which was the subject of the complaint, and with the consent of the parties the complaint was dismissed without prejudice and with the Railroad's counterclaim unaffected (R. 2; App. B, p. A-6). The union filed a counter-counterclaim under Section 3 First (p) of the Railway Labor Act seeking enforcement of the questioned awards of the P. L. Board (R. 63). The awards sustained claims of the Union that the Railroad violated their collective bargaining agreement when it assigned certain work to employees in various other crafts.

The parties filed cross motions for summary judgment and briefs (R. 135; App. B, pp. A-7–A-8). The Railroad argued that the awards were invalid because they changed rather than interpreted the collective bargaining agreement and should be set aside. The Union argued that the Awards interpreted the agreement and should be enforced in accordance with this Court's decision in *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 382 U. S. 257, and the amendments to Sections 3 First (m) and (p) of the Railway Labor Act effected by Public Law 89-456 (45 U. S. C. A., § 153 First (m), (p), 1970 Supp.). Neither side suggested that this Court's decision in *Transportation-Communication Employees Union v. Union Pacific R. Co.*, 385 U. S. 385, had any bearing on this case.

After oral argument in the District Court, the District Judge inquired by telephone of counsel for the parties whether the *Union Pacific* case had any bearing on this case. Both counsel replied that they thought the *Union Pacific* case had no bearing, and the Court asked them to state their position to him in writing. They did so, the Railroad stating that that case had no application because no other union had ever claimed the right to have employees in its craft perform the work (R. 146) and thus the "third party issue" was not presented, and the Union stating that that case had no application because the Railroad did not contend that any other craft was entitled to the work nor was any other craft claiming it (R. 148-49).

The District Court then issued a Memorandum sustaining the position of the Union on the merits of the awards (R. 134-40; App. B, pp. A-6–A-13), but holding that the *Union Pacific* decision of this Court required the Board, before making an award, to ascertain what other unions "may" have an interest in the matter, to give such other unions an opportunity to be heard, and to review all the union contracts to interpret the scope of all of them (even though there was no dispute or claim pending concerning any other contract) (App. B, pp. A-13–A-14; R. 140-42). The same day it entered a Judgment incorporating its Memorandum and remanding the case to the P. L. Board for further determination in accordance with the Memorandum (App. C; R. 142).

The Union appealed (R. 153). After the oral argument in the Court of Appeals the parties settled the underlying disputes and filed in that Court a joint suggestion of mootness and a joint motion to vacate the judgment of the District Court and to remand the case to the District Court to dismiss it as moot (App. E, p. A-20). The Court of Appeals held (by a divided Court) that the Judgment

of the District Court was not a "final decision" within the meaning of 28 U. S. C. A., § 1291, and hence not appealable (App. E, pp. A-20–A-21). It held further that since the Judgment was not appealable it had no jurisdiction to grant the joint motion (App. E, p. A-20). The dissenting opinion was of the view that the awards were proper and should have been enforced, that 28 U. S. C. A., § 1291 should not be construed to prevent a review of the District Court's order, and that the joint motion to vacate and remand for dismissal should have been granted (App. E, p. A-21).

The jurisdiction of the District Court to entertain the original complaint was invoked under 28 U. S. C. A., § 1337 (R. 133; App. B, p. A-6). The jurisdiction of the Court to entertain the Railroad's counterclaim was invoked under 45 U. S. C. A., § 153 First (q) of the Railway Labor Act (R. 6). The jurisdiction of the District Court to entertain the Union's counter-counterclaim was invoked under 45 U. S. C. A., § 153 First (p) (R. 63).

REASONS FOR GRANTING THE WRIT

I. This Case Involves an Important Question of Law Under the Railway Labor Act That Has Not Been But Should Be Decided by This Court, i. e., Whether a Judgment of a District Court Remanding an Award to an Adjustment Board, Permitted by the Recently Enacted Section 3 First (q) of the Railway Labor Act, Is an Appealable Decision.

Prior to the 1966 Amendments to the Railway Labor Act, the only judicial review of an award of the Adjustment Board was in an action to enforce the award if the carrier did not comply with it. In such an action, the District Court was authorized "to enforce or set aside the order of the division of the Adjustment Board", 45 U. S. C. A., § 153 First (p). Any such judgment was of course appealable under 28 U. S. C. A., § 1291.

In 1966 Public Law 89-456 added an additional method of review and an additional type of judgment that could be rendered. The new Section 3 First (q) provides for "a petition for review" in a District Court by an employee or carrier aggrieved by an award. In such an action the Court is authorized "to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division. . . ." In *Transportation-Communication Employees' Union v. Union Pacific*, 385 U. S. 158 (1966), this Court held (at 165, fn. 4) that the newly authorized judgment of remand was proper in an enforcement action as well as on a petition for review.

But whatever the form of the judgment, the new subsection (q) provides that it

> ". . . shall be subject to review as provided in Sections 1291 and 1254 of Title 28, United States Code".

Section 1291 provides for review of the judgment by appeal to the appropriate United States Court of Appeals. Yet the Court below held that when the judgment is in the form of a remand it is not appealable under Section 1291, even though such judgment is erroneous and even though, as in this case, it erroneously refused to grant enforcement of the award. The dissenting judge below dissented on both grounds; he dissented because he thought the awards were proper and should have been enforced and because he thought Section 1291 should not be construed to preclude review of the District Court's order under the circumstances of this case. He noted that after the oral argument in the Court of Appeals the parties settled the underlying dispute and filed a joint suggestion of mootness and a joint motion to vacate the judgment of the District Court and to remand the case to that Court with directions to dismiss as moot. He would have granted the motion. The majority opinion, based on inapposite authority, held that since in its view the appeal was improperly taken the Court did not have jurisdiction even to enter the requested order.

The question of the appealability of a judgment of remand in an enforcement action or on a petition for review, first made available in the 1966 amendments of the Railway Labor Act, presents an important and novel question which should be, but has not been, decided by this Court. Cf. *Rothensies v. Electric Storage Battery Co.*, 329 U. S. 296, 299 (1946); *American Federation of Musicians v. Wittstein*, 379 U. S. 171, 174-75 (1964).

We believe this is the first case in which a Court of Appeals held that a judgment of a District Court that refused to enforce an Adjustment Board award and instead remanded it to the Board, was not appealable. Before the 1966 amendments, any judgment in an action on an award, enforcing it or refusing to enforce it, was unquestionably

appealable. But under the decision below, if a judgment refuses to enforce an award and remands it, but does not say in so many words that it refuses to enforce it, the judgment is not appealable. But a judgment of remand is just as effective a denial of enforcement as a judgment that says it denies enforcement. Whether a denial of enforcement is appealable should not turn on the language the judgment happens to contain, but on its effect. See esp. *Gillespie v. United States Steel Corp.*, 379 U. S. 148, 152-54 (1964) and *Brown Shoe Co. v. United States*, 370 U. S. 294 (1962).

If the decision below stands, a new way has been found to deny enforcement of Adjustment Board awards, contrary to the intent of Congress in amending Subsections 3 First (m) and (p) of the Railway Labor Act in 1966 and what was thought to have been decided by this Court in *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 382 U. S. 257 (1965). Under the majority opinion below, all the District Court need do is to deny enforcement of an award by remanding it, and such judgment is not reviewable even if contrary to law and the law required the award to be enforced. Such posture of the law would not be sensible, especially in a situation like here where the District Court completely disposed of the case before it and did not even purport to retain jurisdiction to do anything but execute its judgment. Certainly there is no provision in the Railway Labor Act, especially in view of the last sentence of Subsection 3 First (q), to indicate that Congress intended to deprive a beneficiary of an Adjustment Board award of appellate review of a judgment that refuses to enforce the award.

Nor could the District Court properly have retained jurisdiction. If, after the remand to the Board, the Board should render an award different from its initial award, the Union would have the right under Section 3 First (q)

to file a "petition for review" "in any United States District Court in which a petition under paragraph (p) [an enforcement action] could be filed". Under paragraph (p) such petition may be filed "in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates . . ." No District Court has the right to deprive a petitioner of such choice of venue by arbitrarily retaining jurisdiction of an antecedent action, nor did the District Court in this case purport to do so. It completely disposed of the action before it.

II. The Decision Below, Holding That a District Court Judgment Refusing to Enforce or Set Aside Adjustment Board Awards and Remanding the Dispute to the Board for Further Proceedings and Terminating the Case in the District Court, Is Not an Appealable Order, Is Unprecedented and Frustrates the Holding of This Court in the Gunther Case and Frustrates 1966 Amendments to the Railway Labor Act.

In *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 382 U. S. 257 (1965), this Court definitively held that awards of the National Railroad Adjustment Board were to be enforced unless (at 261) they were "wholly baseless and completely without reason".

The following year, by enacting Public Law 89-456, Congress amended Sections 3 First (m) and 3 First (p) of the Railway Labor Act (45 U. S. C. A., §§ 153 First (m) and (p)) to make all awards of the Board and a P. L. Board for which it first provided in Section 3 Second, regardless of whether they contain money awards, "final and binding", and to provide that in an action to enforce an award "the findings and order of the division of the Adjustment Board shall be conclusive on the parties". It lim-

ited judicial review only to certain jurisdictional defects and fraud, and, according to Senate Report 1201 to accompany H. R. 706, 89th Cong., 2d Sess., p. 3, to determining whether an award was "actually and indisputedly without foundation in reason or fact".

The District Court found the awards unassailable on the merits within the above-quoted standards, but thought the Board had not followed the correct procedure. It entered its "Judgment" (R. 142; App. C, p. A-15) remanding the disputes to the Board for the Board to follow additional procedures. It did not retain jurisdiction of the case for any purpose. There was nothing left for the District Court to do except execute its judgment requiring notice to other unions and to make an interpretation "of all the contracts" (R. 142; App. B, p. A-14). The only proper issue on appeal was whether the awards should be enforced or whether the remand was correct. The appeal was not a piecemeal appeal; it would decide the entire case. And the Court below, by a divided Court, found such judgment not appealable, even if it was erroneous.

Such combination of holdings, if permitted to stand, invents a new way to defeat the finality and conclusiveness of awards. By the simple device of refusing to enforce awards and remanding them to the Board, *even if such remand is erroneous and the awards should have been enforced* (as the dissenting Judge below thought they should have been), since appeal is denied the intent of Congress in enacting Public Law 89-456 and, we believe, of this Court's decision in the *Gunther* case, is frustrated. Such circumvention of what by now is abundantly clear was the intent of Congress and this Court's decision in the *Gunther* case and earlier cases, should not be permitted to continue and expand. And expand it will, unless corrected. The decision below is already being relied upon, in a case now pending in the Seventh Circuit, for an order not being

appealable in which the District Court denied enforcement of an award and remanded it to the Adjustment Board because the District Judge thought the arbitrator should consider certain evidence which the arbitrator thought should not be considered. *United Transportation Union v. Illinois Central Railroad*, No. 18,033; the decision of the District Court in the case, *sub nom. Brotherhood of Railroad Trainmen v. Illinois Central R. Co.*, is reported at 72 LRRM 2877, not otherwise reported.

III. The Decision Below Leaves Standing a Gross Misapplication of This Court's Decision in Transportation Communication Employees Union v. Union Pacific R. Co., 385 U. S. 157 (1966).

The decision of the District Court, left standing by the Court below, is a gross misapplication of this Court's decision in the *Union Pacific* case.

In *Union Pacific*, the work formerly performed by two crafts (clerks and telegraphers) was performed by one man through technological innovation. The railroad assigned a clerk to operate the new machine. The telegraphers union claimed one of its men should be assigned to the job because it performed, in part, communication work. The claim was progressed to the Adjustment Board. The Board notified the Clerks' union of the pendency of the claim; the Clerks declined to participate but stated that if the jobs of its men should be threatened it would file a claim. 385 U. S. at 158-59. The Board decided the Telegraphers' claim solely on the basis of the Telegraphers' contract without considering any rights under the Clerks' contract, and held the Telegraphers' contract covered the job. This Court held that the Board in such situation must decide the Telegraphers' claim not solely on the basis of the Telegraphers' contract but also in the light of the Clerks' contract, whether or not the Clerks participated.

The District Court in this case, after holding for the Union on all issues raised by the parties, held that the *Union Pacific* case required the Board to give notice to the other unions that had contracts with the Frisco and to "review the other union contracts for the purpose of making an interpretation of the scope of all the contracts . . ." (R. 142; App. B, p. A-14; App. C, p. A-15). Such issue had not been raised or argued by any of the parties. Before issuing his opinion the District Judge called counsel for the parties and asked them what significance they thought this Court's *Union Pacific* opinion had to this case. Both sides replied that it was not applicable at all because no other union had ever claimed the right to perform the work, and the Frisco's sole contention was that the assignment of the work was a matter of managerial discretion (R. 146-49).

The facts here are *toto coelo* different from the facts in the *Union Pacific* case. No other craft claims the work. In the twelve claims involved in the awards, the Frisco assigned the work indiscriminately, to a yardmaster, to a clerk, to a member of the train crew, to a telegrapher, etc. No union other than the Telegraphers filed a claim. The claims involved no dispute then existing or agreement between the Frisco and any other union. Yet the holdings below require the Board to see if it can stir up some disputes. When this Court in *Union Pacific* held that the Board must consider "this entire dispute" (at 165), surely it referred to disputes then existing, not to disputes the Board might succeed in stirring up. The Adjustment Boards are established to resolve disputes, not to create them.

IV. The Refusal of the Court of Appeals to Grant the Joint Motion of All the Parties to Vacate the Judgment of the District Court and to Remand With Directions to Dismiss as Moot Is In Conflict With the Long-Established Practice of This Court.

Even if we assume that the judgment of the District Court would not ordinarily be appealable to the Court of Appeals, we believe it is stretching technicalities too far, and is unrealistic, to hold that the Court of Appeals did not have jurisdiction even to recognize that the underlying dispute had been settled and to make the appropriate disposition of the appeal in such situation. The appropriate disposition of an appeal when the underlying dispute is settled while the case is on appeal is not to decide the appeal but to vacate the judgment below and to remand the action to the trial court with a direction to dismiss as moot. *United States v. Munsingwear, Inc.*, 340 U. S. 36, 39; *Duke Power Co. v. Greenwood County*, 299 U. S. 259, 267; *Brotherhood of Locomotive Firemen v. Toledo, P. & W. R. Co.*, 332 U. S. 748; *Securities & Exchange Commission v. Harrison*, 340 U. S. 908; *Howard v. United States*, 340 U. S. 898; *Barnes v. Akron, C. & Y. R. Co.*, 348 U. S. 893; *Hall v. Beals*, U. S. Sup. Ct., Oct. Term, 1969, No. 39, 90 S. Ct. 200, 38 Law Week 4006 (Nov. 24, 1969).

In the *Munsingwear* case, this Court said (at 39, fn. 2) that:

> "This has become the standard disposition in federal civil cases,"

citing a long line of cases.

In the *Duke Power Co.* case, the case became moot while pending on appeal because the contract which the plaintiff sought to enjoin had been superseded by another contract. This Court said (at 267):

> "We thus have a situation in which both courts below have failed to act in accordance with the standards of proper procedure. Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss."

In *Barnes v. Akron, C. & Y. R. Co.*, 348 U. S. 893, a petition for certiorari had been filed in this Court. The opposition to the petition consisted simply of an explanation that the underlying controversy had become moot. This Court granted the petition for a writ of certiorari and in the same order vacated the judgment of the court of appeals and remanded the case to the district court to dismiss it as moot. We believe that at the very least such an order should be entered here.

In *Gold v. Lomenzo*, ... F. 2d ..., decided January 22, 1970, by the 2d Circuit, 38 Law Week 2430, the District Court had denied a motion for the convening of a three judge Court and took action on the merits. The Court of Appeals for the Second Circuit thought that it did not have jurisdiction of the appeal, "the proper remedy being an application to the Supreme Court for a writ of mandamus." But, it held "that if a Court of Appeals does not exactly have jurisdiction of an appeal such as this, it has something sufficiently similar to enable it to reverse for the convening of a three judge court", and it took such action.

We suggest that *a fortiori*, even if the Court of Appeals in this case did not exactly have jurisdiction of the appeal, it had something sufficiently similar to enable it to reverse and remand for dismissal as moot. Such action would follow *a fortiori* from the *Lomenzo* case because, in that case the Second Circuit reversed and remanded for the District Court to decide the opposite of what it had

decided on the three judge issue, while in this case the Court below would have and should have reversed and remanded only for the purpose of enabling the District Court to recognize the existing changed situation and not to decide any issue because no justiciable issue then existed.

CONCLUSION

We submit that this Court should grant the writ either for the purpose of considering whether the holding of the Court below was correct or for the purpose of vacating the judgment of the Court below and remanding the case to the District Court with a direction to dismiss the action as moot.

Respectfully submitted

Commonwealth Building
1625 K Street, N. W.
Washington, D. C. 20006

MILTON KRAMER

818 Olive Street
St. Louis, Missouri 63101

JOHN H. HALEY, JR.

Counsel for Petitioners

APPENDIX.

APPENDIX A

STATUTES INVOLVED

Railway Labor Act

Section 3 First (p), (q), 45 USC 153 First (p), (q) (1970 Supp.)

Section 3 Second, 45 USC 153 Second (1970 Supp.)

Judicial Code, 28 USC, Section 1254, Section 1291

Section 3 First (p), Railway Labor Act

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties,[4] and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter

[4] (Public Law 456, 89th Cong.) (H. R. 706); (Approved June 20, 1966).

such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

Section 3 First (q), Railway Labor Act

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.

Section 3 Second, Railway Labor Act, second paragraph

If written request is made upon an individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or of any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such

matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board. As amended June 20, 1966. Pub. L. 89-456, §§ 1, 2, 80 Stat. 208, 209.

28 United States Code (Judicial Code), §§ 1254, 1291

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.
As amended Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

APPENDIX B

OPINION OF DISTRICT COURT

Memorandum

(Filed in U. S. District Court on Aug. 8, 1968)

The Transportation-Communication Employees Union and the Transportation-Communication Employees Union, Frisco System Division 32, filed suit under 28 U. S. C. 1337 against the St. Louis-San Francisco Railway Company seeking an injunction prohibiting the abolishment of certain employee job positions or in the alternative prohibiting the operation of certain computer equipment. St. Louis-San Francisco Railway Company (Frisco) filed a permissive counterclaim against the Transportation Communication Employees Union and the Transportation-Communication Employees Union, Frisco System Division 32 (Union), under the provisions of 45 U. S. C. 153, First, (q), seeking review of certain awards rendered by Public Law Board No. 34. With consent of the parties, the Union's complaint was dismissed without prejudice by Court order entered February 23, 1968. The dismissal did not effect the counterclaim filed by Frisco.

Pursuant to 45 U. S. C. 153, Second, Frisco and the Union entered into an agreement on May 16, 1967, establishing Public Law Board No. 34 to hear and decide seventy-four matters then in dispute between them. Public Law Board No. 34 (Board) proceeded to hear and render awards on the disputed matters submitted to it. Among the awards which it rendered were awards Nos. 18, 23, 24, 54, 55, 56, 57, 58, 59, 60, 61, and 72. Frisco alleges that the Board failed to comply with the provisions of the Railway Labor Act, 45 U. S. C. 151, et seq., in issuing the above twelve awards because it failed to confine it-

self to matters within the scope of its jurisdiction in the following respects:

(1) The Board failed to confine itself to the issues submitted to it for decision;

(2) The holding of the Board that the term "radio" was included within the scope rule of the labor agreement in issue constituted an unlawful change in the terms of a labor agreement which the Board had no jurisdiction to accomplish, changes in labor agreements in the railway industry being confined solely to the method and manner prescribed by the Railway Labor Act, 45 U. S. C., § 151, et seq.;

(3) The function of the Board delegated to it, i. e., interpretation and application of labor agreements, was exceeded when the Board rewrote the labor agreement to include jobs, functions and media within the scope rule not included by labor and management nor even contemplated by them when the scope rule was written.

(4) The Board completely ignored the provisions of law for the purpose of changing a labor agreement, i. e., 45 U. S. C. A., § 156, and substituted a law-making and agreement-writing function for the orderly processes enacted by Congress;

(5) The Board failed and refused to follow the dictates of statutes and governing court decisions in rendering said awards.

Frisco requested the Court to review the twelve awards and set them aside. The Union counterclaimed requesting the Court to enforce the awards under the provisions of 45 U. S. C. 153, First, (p), and to award attorney fees to the Union.

The Union made a motion for judgment on the pleading, which it later requested to be treated as a motion for

summary judgment. Frisco also made a motion for summary judgment.

Public Law Board No. 34 was created by agreement of the parties under the provisions of 45 U. S. C. 153, Second. That section of the Railway Labor Act provides that the awards of the boards created thereunder "shall be final and binding upon both parties to the dispute". The statute provides that "[c]ompliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board." The provisions of the Railway Labor Act relating to review by the United States district courts of orders and awards of the Adjustment Board (National Railroad Adjustment Board) are found in 45 U. S. C. 153, First, (p) and (q). The district courts are given jurisdiction to enforce the orders of the Adjustment Board and are granted a very limited jurisdiction to set aside such orders.

Research has failed to reveal a case in which an award of a board created under the provisions of 45 U. S. C. 153, Second, has been enforced or reviewed by the courts. The extent of this Court's jurisdiction under the statute to review the decisions of such boards must be determined. Chapter 45, U. S. C. 153, Second, on its face, seems to limit the jurisdiction of the United States district courts to enforcement of the awards of the boards. That section of the statute refers only to enforcement, it does not talk of the setting aside of an award as does 45 U. S. C. 153, First, (p) and (q). If the United States district courts have jurisdiction to do anything other than enforce such orders, it must arise by incorporation of all the provisions of 45 U. S. C. 153, First, (p) and (q), into 45 U. S. C. 153, Second, by the phrase "in the same man-

ner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board."

The Railway Labor Act, 24 U. S. C. 151, et seq., was amended in 1966. Among the provisions amended are those under consideration, 45 U. S. C. 153, First, (p) and (q), and 45 U. S. C. 153, Second. The legislative history of the 1966 amendments indicates conclusively that Congress intended for the United States district courts to have jurisdiction to review the awards of the boards created by agreement of the parties under 45 U. S. C. 153, Second, to the same extent that the district courts were granted jurisdiction to review orders of the Adjustment Board under 45 U. S. C. 153, First, (p) and (q). See S. Rep. No. 1201, 89th Cong., 2d Sess., June 2, 1966, 2 U. S. Cong. & Admin. News (1966), p. 2285 at 2289. See also **Dominquez v. National Airlines, Inc.**, 279 F. Supp. 392 (S. D. N. Y. 1968) (dictum).

The review by this Court of the awards issued by Public Law Board No. 34 is severely limited by statutory provisions and judicial precedent. The statute, 45 U. S. C. 153, First, (p) and (q), provides that an award of the Adjustment Board (and, therefore, of the boards created under 45 U. S. C. 153, Second) may be set aside only for: failure to comply with the provisions of chapter 45, U. S. C., failure of the order to conform, or confine itself, to matters within the scope of the board's jurisdiction; or for fraud or corruption by a member of the division making the order. The Supreme Court of the United States has held that district courts may only set aside an order if the board's decision is "wholly baseless and completely without reason." **Gunther v. San Diego & A. E. Ry.**, 382 U. S. 257 (1965). The legislative history of the 1966 amendments to the Railway Labor Act shows that Congress intended that the courts were to continue

to have the power to set aside orders of the boards which were "actually and indisputedly without foundation in reason or fact." S. Rep. No. 1201, 89th Cong., 2d Sess., June 2, 1966, 2 U. S. Cong. & Admin. News (1966), p. 2285 at 2287.

One category of disputes submitted to the Board concerned twelve separate incidents in which Frisco assigned the transmission of radio communication to certain employees. The Union alleged that the Scope Rule of the collective bargaining agreement between Frisco and the Union had been violated by failure to assign such work to employees represented by it. The Union requested compensation for the employees to whom it alleged the work should have been assigned. The twelve awards under review by this Court were submitted to the Board by Frisco and by the Union for the Board's determination of whether the Scope Rule of the collective bargaining agreement included communications by "radio".

The Union contended that "radio" was included in the Scope Rule of the Telegraphers' Agreement. Frisco contended that "radio" was not included in the Scope Rule. The Board determined that the Scope Rule of the collective bargaining agreement between the parties did include "radio" communications.

The complaint of Frisco before this Court is that the Board exceeded its jurisdiction and rewrote the agreement between the parties when it determined that the Scope Rule included "radio". Frisco contends that the Union has accomplished a change in the collective bargaining agreement under the guise of processing a grievance. The Union and Frisco by agreement set up Local Board No. 34 to hear and decide certain disputes which were in existence between them. Twelve of these disputes involved the interpretation of the Scope Rule, and whether that rule included certain communications by radio. Frisco

stated in its statement to Public Law Board No. 34 in case No. 18 (award No. 18) that "[t]his is a Scope Rule dispute." The present position of Frisco is apparently that the Board had jurisdiction to determine that the Scope Rule did not cover the acts in question, but that the Board did not have jurisdiction to determine that the act in question was covered by the Scope Rule.

The essence of what Frisco is requesting of this Court is an interpretation of the provisions of the bargaining agreement between the parties. Frisco is requesting an interpretation that the Board exceeded its jurisdiction in that it wrongly interpreted the Scope Rule. The Court is, thus, requested to rule that the Board's interpretation of the Scope Rule was incorrect. This would not be a ruling on the jurisdiction of the Board, but a review of the merits have made it very clear that the courts are not to substitute their opinion for that of the Board's. The courts may set aside a decision of a board only if it is "wholly baseless and completely without reason." The decision must be "actually and indisputedly without foundation in reason or fact." A review of the decision of the Board in award No. 18 shows that it does not meet this test. The basis of the Board's decision in award No. 18 also serves as the foundation for the decisions in awards Nos. 23, 24, 54, 55, 56, 57, 58, 59, 60, 61, and 72.

Firsco cites several cases which discuss the difference between "major" disputes and "minor" disputes under the Railway Labor Act. The importance of this distinction is that the major disputes are not subject to the jurisdiction of the Adjustment Board created by 45 U. S. C. 153, First, and, hence, not proper subject matter for boards created under 45 U. S. C. 153, Second. The basic distinction between "major" disputes and "minor" disputes was drawn by the United States Supreme Court in **Elgin, J. & E. Ry. v. Burley**, 325 U. S. 711 (1945). The Court said in that case:

"[A 'major' dispute] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

"[A 'minor' dispute], however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case."

The difference between the interpretation of an existing agreement, and a change in the original intended basis of an agreement, as pointed out by the Eighth Circuit Court of Appeals in **Missouri-Illinois R. R. v. Order of Railway Conductors,** 322 F. 2d 793 (1963), is often a question of degree. The degree in this particular situation has already been decided by the United States Supreme Court. The essence of the dispute in this case is over work assignment. It is a dispute as to whether a certain employee must be utilized to perform a certain job with the use of radio. The Supreme Court, in **Transportation Union v. Union Pacific R. R.**, 385 U. S. 157 (1966), had before it a dispute over the assignment of certain jobs in connection with IBM machines. The railroad had assigned the jobs to members of the Clerks Union. The Telegraphers Union (the same Union as involved in this action) had sought compensation from the railroad for its members who had been idle because of the assignment to the clerks. The dispute between the railroad and the union was heard by the Adjustment Board under the provisions of 45 U. S. C. 153, First. The Supreme Court in review of the matter stated

that the Adjustment Board had jurisdiction to hear and decide controversies over the interpretation of the bargaining agreement between the railroad and the union as it relates to work assignment.

This decision by the Supreme Court must, of necessity, have included a determination that a dispute as to work assignments is a minor dispute. This Court is of the opinion that the attack of Frisco upon the jurisdiction of the Board because of the "major" versus "minor" distinction is disposed of by the Supreme Court's holding in **Transportation Union v. Union Pacific R. R.**, supra.

That case, however, raises a question which although not brought forward by either party to this suit must be answered by the Court. The Supreme Court noted that it is often assumed that a dispute over work assignments is a dispute between an employer and only one union, and, therefore, must be decided on the language of a single collective bargaining agreement considered in isolation from all other agreements. The Court rejected such reasoning, holding that "[i]n order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements . . ." The Board, said the Supreme Court, heard and decided the case without considering the railroad's liability to the clerks under its contract with them. The Court held that the Clerks Union was an indispensable party and directed that the cause be remanded to the Adjustment Board. The Adjustment Board was required to give the Clerks Union an opportunity to be heard and to resolve the entire dispute upon consideration of all the contracts the railroad had with any union "involved" in the overall dispute.

The awards of Public Law Board No. 34 did not consider the possibility that another union might have an interest in the determination that communication by radio in a particular instance comes within the Scope Rule of

the labor contract between Frisco and the Transportation-Communication Employees Union. Awards 18, 23, 24, 55, 56, 57, 58, and 72 state that a "Telegrapher" handled the particular communication in question. A "Telegrapher" is presumedly a member of the Transportation-Communication Employees Union, which is a party to this action. Awards 60 and 61 state that the communication in question was handled by a "Clerk". Award 59 states that the communication was handled by a "Yardmaster". Award 54 states that the communication was handled by a "member of train crew". The Court is unable to determine from the record the union membership of the individuals who handled the communications in awards 54, 59, 60, and 61.

This Court is of the opinion that the Board cannot make a proper determination of the matter unless it also reviews the contracts with Frisco of the other unions who may have an interest in this matter. See **Brotherhood of Railroad Signalmen v. Southern Ry.**, 380 F. 2d 59 (4th Cir. 1967), cert. denied, 389 U. S. 958 (1967). See also **Order of Railroad Telegraphers v. New Orleans, Texas & Mexico Ry.**, 229 F. 2d 59 (8th Cir. 1956), cert. denied, 350 U. S. 997 (1956).

These awards will be remanded to the Board for a determination of the other unions who may have an interest. After this determination has been made and the other unions have been given an opportunity to be heard, the Board shall then review the other union contracts for the purpose of making an interpretation of the scope of all the contracts and what effect they may have on these awards, if any.

Attorneys' fees will be denied.

Dated this 8th day of August, 1968.

/s/ James H. Meredith,
United States District Judge

APPENDIX C

JUDGMENT OF DISTRICT COURT

Judgment

(Filed in U. S. District Court on Aug. 8, 1968.)

A memorandum dated this day is hereby incorporated in and made a part of this judgment.

It Is Hereby Ordered, Adjudged and Decreed that the cause be and the same is remanded to Public Law Board No. 34 for a further determination in accordance with the memorandum.

Dated this 8th day of August, 1968.

/s/ James H. Meredith
United States District Judge

APPENDIX D

ORDER DENYING MOTION TO AMEND JUDGMENT

Order

(Filed in U. S. District Court on Jan. 17, 1969)

This matter is pending on motion of the plaintiffs to amend the judgment of the Court dated August 8, 1968. The Court has been duly advised by briefs and oral argument and is of the opinion that the matters raised on the motion to amend are insufficient to cause the judgment to be amended. Accordingly,

It Is Hereby Ordered that the motion to amend the judgment be and the same is denied.

Dated this 16th day of January, 1969.

/s/ James H. Meredith
United States District Judge

APPENDIX E

OPINION OF COURT OF APPEALS AND DISSENT

Van Oosterhout, Chief Judge.

Plaintiffs, Transportation-Communication Employees Union and Transportation-Communication Employees Union, Frisco System Division 32 (TCU), have taken a timely appeal from judgment entered by the District Court on August 8, 1968, and from order of January 16, 1969, denying plaintiffs' motion to amend the judgment.

The threshold issue is whether either of such judgments are final decisions upon which an appeal will lie. We hold that neither of such judgments are final decisions and that plaintiffs' appeal must be dismissed for want of jurisdiction.

The issues involved and the factual background of this litigation are fairly stated in the trial court's memorandum opinion reported at 296 F. Supp. 507. It is sufficient for our present purposes to state that TCU sought enforcement of certain arbitration awards made by Public Board No. 34, which Board was created by agreement of the parties to this litigation pursuant to the provisions of 45 U. S. C. A. § 153, Second. The defendant railway has sought review of such awards. Each of the parties made motions for summary judgment. No ruling was made on such motions. The awards of the Public Board were neither enforced nor rejected, nor was the action dismissed. The court in its memorandum opinion, after ruling upon several of the issues raised, concluded its opinion as follows:

> "This Court is of the opinion that the Board cannot make a proper determination of the matter unless

it also reviews the contracts with Frisco of the other unions who may have an interest in this matter. . . .

"These awards will be remanded to the Board for a determination of the other unions who may have an interest. After this determination has been made and the other unions have been given an opportunity to be heard, the Board shall then review the other union contracts for the purpose of making an interpretation of the scope of all the contracts and what effect they may have on these awards, if any." 296 F. Supp. 507, 511.

The judgment entered August 8, 1968, reads:

"A memorandum dated this day is hereby incorporated in and made a part of this judgment.

"It is Hereby Ordered, Adjudged and Decreed that the cause be and the same is remanded to Public Law Board No. 34 for a further determination in accordance with the memorandum."

Subsequently on January 11, 1969, the trial court denied TCU's motion to amend the judgment to enforce the awards or in the alternative, to grant an evidentiary hearing upon the jurisdictional dispute issue. This appeal is from the judgment entries just described.

The trial court properly determined that it had jurisdiction over the controversy under 45 U. S. C. A. § 153, First, (p) and (q), and § 153, Second as amended. Included in § 153, First, is the following:

"The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. . . ."

See *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U. S. 157, 165, n. 4, for an interpretation of this provision.

Courts of Appeals have only such jurisdiction as is conferred by statute. The pertinent statute here involved, 28 U. S. C. A. § 1291, provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . ."[1]

"A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but to execute the judgment." *Catlin v. United States*, 324 U. S. 229, 233. To like effect, see *Stewart v. Bishop*, 8 Cir., 403 F. 2d 674, 678; *Bohms v. Gardner*, 8 Cir., 381 F. 2d 283, 285; *Smith v. Sherman*, 8 Cir., 349 F. 2d 547, 551.

A remand order for further proceedings is not a final decision contemplated by § 1291. *Bohms v. Gardner*, supra; *Marshall v. Celebrezze*, 3 Cir., 351 F. 2d 467; *Mayersky v. Celebrezze*, 3 Cir., 353 F. 2d 89; *Stathatos v. Arnold Bernstein S. S. Corp.*, 2 Cir., 202 F. 2d 525.

We are convinced that when the law is applied to the facts of this case, the conclusion must follow that the judgments appealed from are not final decisions. The trial court has neither enforced nor denied enforcement of the Board's awards. It has made no final determination of the merits of the controversy and it has not dismissed the action.

As pointed out by TCU, the court did in its memorandum opinion determine some issues, such as a holding that the dispute was a minor dispute and that the Arbitra-

---

[1] This case does not fall within any of the provisions of § 1292(a) authorizing interlocutory appeals, nor have the provisions of § 1292(b) been utilized. Likewise the provisions of Rule 54(b), Fed. R. Civ. P., have not been followed.

tion Board had jurisdiction to decide the controversy over the interpretation of the bargaining agreement between TCU and the railroad. Such rulings are interlocutory and remain subject to revisions at any time before final decision and are reviewable only upon an appeal from final judgment. Rule 54 (b), Fed. R. Civ. P., *Stewart v. Bishop*, supra, p. 680 of 403 F. 2d; *Mesabi Iron Co. v. Reserve Mining Co.*, 8 Cir., 270 F. 2d 567, 569.

TCU urges that the trial court by its remand to the Board has lost jurisdiction of the case and that review of any subsequent proceedings by the Board could be instituted in another court. Whether or not the subsequent proceedings could be instituted in another court in our view has no material bearing upon the crucial issue of whether the orders appealed from are final decisions. As heretofore pointed out; the orders appealed from do not meet the finality standards set forth in the cases previously discussed.

Inasmuch as the appeal must be dismissed because the judgments appealed from lack finality, we do not have before us the issue of whether the interlocutory orders made by the trial court are correct and we express no view upon such issue.

The parties on December 5, 1969, filed joint suggestion of mootness and joint motion to vacate the judgment below and to remand the case to the District Court with direction to dismiss. Such suggestion was received subsequent to the preparation but before the filing of this opinion. Inasmuch as we have held that the court has acquired no jurisdiction over this appeal, it has no jurisdiction to enter the requested order to vacate the judgment and remand the case to the District Court with direction to dismiss.

The appeal is dismissed for want of jurisdiction.

Heaney, Circuit Judge, dissenting.

I respectfully dissent. The award of the Public Board was a proper one and should have been enforced by the District Court. 28 U. S. C. A., § 1291 should not be construed to prohibit a review of the District Court's order under the circumstances of this case.

Subsequent to the preparation of the majority opinion in this case, the parties resolve the basic dispute and filed a joint motion with this Court to vacate the judgment below and to remand the case to the District Court for directions to dismiss. I would grant the motion. As it is, the parties have the right to seek relief in the court below.

Because the basic dispute has been settled, I do not feel it necessary to expand on my views.

APPENDIX F

JUDGMENT OF COURT OF APPEALS.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the appeal from the said District Court in this cause be, and the same is hereby, dismissed for want of jurisdiction.

December 19, 1969

APPENDIX G

ORDER OF COURT OF APPEALS DENYING PETITION FOR REHEARING

On consideration of petition of appellants for rehearing in this cause, it is now here ordered by this Court that the petition for rehearing be and is hereby denied.

February 16, 1970

LIBRARY
UPREME COURT, U. S.

JUL 11 1970

E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No [redacted] 155

TRANSPORTATION-COMMUNICATION DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

PAUL R. MOODY
300 Frisco Building
St. Louis, Missouri 63101
Counsel for Respondent

Of Counsel
JOHN E. McCULLOUGH
300 Frisco Building
St. Louis, Missouri 63101

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

INDEX

	Page
Questions presented	1
Statement of the case	2
Reasons for denying the writ	4
I. The writ should be denied because the underlying controversy between the parties has been completely settled and a decision of this Court would have no effect on the parties or the issues below	4
II. The District Court properly remanded the Awards of the ~~P. L.~~ Board to that Board within jurisdiction delegated by the Railway Labor Act and as ordered by this Court	7
III. The Appellate Court properly held that the remand to the Board ordered by the District Court was not an appealable order because it did not constitute a "final decision"	10
Conclusion	12
Appendix A	A-1

Cases Cited

Bohms v. Gardner, 381 F. 2d 283 (8 Cir. 1967) 11

Brotherhood of Railroad Signalmen v. Southern Ry. Co., 380 F. 2d 59 (4 Cir. 1967), cert. den. 389 U. S. 958 9

Catlin v. United States, 324 U. S. 229, 65 S. Ct. 631, 89 L. Ed. 911 (1945) 10, 11

Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711 (1945).. 8

Mills v. Green, 159 U. S. 651 (1895)..... 4

Oil Workers Unions v. Missouri, 361 U. S. 363 (1959) 4

Order of Conductors v. Pitney, 326 U. S. 561 (1946).. 8

Sears, Roebuck & Co. v. Carpet Layers, 90 S. Ct. 1299 (1970) 4

Taggart v. Weinacker's, Inc., 90 S. Ct. 876 (1970).... 5

Transportation-Communication Employees Union v. Union Pacific, 385 U. S. 157, 87 S. Ct. 369, 17 L. Ed. 2d 264 (1966) 3, 7, 8, 9

U. S. v. Alaska S. S. Co., 253 U. S. 113 (1920)..... 5

Statutes Cited

28 U. S. C. A., § 1254 10

28 U. S. C. A., § 1291 ..... 2, 3, 10

45 U. S. C. A., § 153 ..... 2, 3, 9, 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1564

TRANSPORTATION-COMMUNICATION DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari, review and decide a mooted controversy which was fully and completely settled by agreement of the parties during pendency in the Appellate Court.

2. Whether a District Court has jurisdiction to remand Awards rendered by a Special Board of Adjustment established under § 3 Second of the Railway Labor Act

(1966 Amendment) for the purpose of determining the existence or non-existence of any third party claims and to require a final decision incorporating such determination.

3. Whether remand to a Special Board of Adjustment by a District Court for the purpose of determining the existence or non-existence of third party claims constitutes a "final decision" within the intendment of 28 U. S. C. A., § 1291.

STATEMENT OF THE CASE

This case has its origin in a Complaint for Injunction filed by Transportation-Communication Employees Union, et al. (hereinafter called "TCU") against St. Louis-San Francisco Railway Company (hereinafter called "Frisco") (R. 133). By way of permissive counterclaim Frisco prayed for judicial review of 12 awards entered by a Board (hereinafter called "P. L. Board 34") which had been created in accordance with 45 U. S. C. A., § 153, Second (as amended 1966) (R. 5). Review was sought within the scope of 45 U. S. C. A., § 153, First (q). TCU subsequently dismissed its Complaint and all that remained alive for decision was judicial review of the P. L. Board awards (R. 2, 133, 134). TCU later filed a "Counterclaim by Plaintiffs to Counterclaim by Defendant" and both parties subsequently filed Motions for Summary Judgment with exhibits attached thereto (R. 2, 3). The Memorandum Opinion of the Court (296 F. Supp. 507; R. 133) failed to specifically grant or deny either party's Motion, but remanded the awards to the Board for further determination pursuant to the jurisdiction granted by Congress in the 1966 Amendments to the Railway Labor Act, 45 U. S. C. A., § 153, First (q):

> "* * * The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or

in part, or it may remand the proceeding to the division for such further action as it may direct."

Prior to the 1966 Amendments to the Railway Labor Act, the Court's jurisdiction on judicial review of Board awards was limited either to enforcing or setting aside the awards (45 U. S. C. A., § 153, First (p), prior to June 20, 1966) however, the Amendments made by Congress in 1966, among other changes, gave the Court jurisdiction to remand the proceedings for such further action as the Court may direct. The District Court determined in light of the mandate of the Railway Labor Act and the decision of this Court in **Transportation-Communication Employees Union v. Union Pacific,** 385 U. S. 157, 87 S. Ct. 369, 17 L. Ed. 2d 264 (1966), that P. L. Board 34 must consider and interpret TCU's labor agreement and scope of rights claimed thereunder in the light of rights belonging to members of other unions who may have an interest. The Court below remanded the awards to the Board for review and a determination of the effect, if any, other union contracts may have on the subject awards (R. 142).

The Order of the Court remanding the awards to the Board was the decision identified by TCU from which it filed its Notice of Appeal to the United States Court of Appeals for the 8th Circuit (R. 153).

That Court held that the remand ordered by the District Court was not such "final decision" as to be proper subject of an appeal under 28 U. S. C. A. 1291 and that there would be no such "final decision" until and unless the Board performed the further duties ordered by the District Court.

After argument and submission in the United States Court of Appeals for the 8th Circuit on November 20, 1969, the parties settled all matters then in dispute between them, including the claims on behalf of the in-

dividuals which constituted the subject matter of the attacked awards. On December 5, 1969, the parties filed a joint suggestion of mootness in the Appellate Court (App. A). However, that Court rendered its Opinion on December 19, 1969 noting that the suggestion of mootness had been filed subsequent to the preparation of the Opinion but before the filing thereof (App. E to Petition for Writ). Thus, despite the fact that the controversy has been conclusively established on the record as moot, Petitioner's Petition for a Writ of Certiorari to this Court seeks review of the decision of the United States Court of Appeals for the 8th Circuit dismissing Petitioner's appeal for want of jurisdiction.

REASONS FOR DENYING THE WRIT

I

The writ should be denied because the underlying controversy between the parties has been completely settled and a decision of this Court would have no effect on the parties or the issues below.

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."

So said this Court in 1895 in **Mills v. Green**, 159 U. S. 651, 653. Perhaps no principle has been adhered to with more unwavering loyalty. That principle was observed as a polestar in **Oil Workers Unions v. Missouri**, 361 U. S. 363, 367 (1959), which in turn was cited in the recent opinion of this Court rendered April 27, 1970 in **Sears, Roebuck & Co. v. Carpet Layers**, 90 S. Ct. 1299, when this Court restated "To adjudicate a cause which no longer exists

is a proceeding this Court uniformly has declined to entertain" (l. c. 1300).

We do not even have here any semblance of the "small embers of controversy", the "bare remnant of the original controversy" or the "atrophied controversy" described by this Court in **Taggart v. Weinacker's, Inc.**, 90 S. Ct. 876, decided March 9, 1970, while dismissing a Writ as improvidently granted. Here, not even a scintilla of a controversy remains, and

> "Where by an act of the parties or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.' **California v. San Pablo & Tulare R. R. Co.**, 149 U. S. 308, 314; **United States v. Hamburg-American Line**, 239 U. S. 466, 475, 476, and previous cases of this court therein cited."

U. S. v. Alaska S. S. Co., 253 U. S. 113, 116 (1920).

Respondent observes the law on this point to be so crystal clear that it will not belabor this Court with additional citations to a principle with which this Court is so intimately familiar. The record in this case is equally clear in reflecting the motion signed and filed by the parties in the United States Court of Appeals for the 8th Circuit (App. A) which by its very first sentence states:

"Come now the Appellants and the Appellee, by their respective counsel, and jointly show to the Court that this case has been settled by agreement of the parties."

The agreement between the parties settling the dispute is not contained in the record below because it was executed subsequent to argument and submission in the Appellate Court. That agreement, dated December 1, 1969, among other settled matters not relevant here, contains the following two paragraphs which deal specifically with this case:

"3. The parties will jointly petition the Court of Appeals for a dismissal of Civil Case No. 19,685 in the United States Court of Appeals for the Eighth Circuit;

"4. Carrier will allow the claims as sustained by Public Law Board No. 34 in Cases Nos. 18, 23, 24, 54, 55, 56, 57, 58, 59, 60, 61 and 72, with the understanding that any reference in such awards to use of radio will not be referred to in the future by either party in the handling of any similar claim. It is understood that the use of radio is not reserved exclusively to telegraphers, but it is agreed that telegraphers shall have the right to handle train orders, block or report trains, receive or forward written messages by radio."

The parties did jointly petition the Court of Appeals for a dismissal of the case in accordance with the agreement contained in paragraph 3. Frisco has also paid the individual claims contained in all of the listed cases before P. L. Board 34, which constituted the subject matter of the court proceedings.

Thus, if this Court should grant Petitioner's Petition for Writ, any judgment which could subsequently be entered would constitute a mere advisory opinion of academic

interest only because it could not possibly have any binding effect or guidance upon the litigating parties. Both parties have already received full satisfaction by their settlement. TCU achieved payment for the individual claims and agreed to dismiss its appeal. Frisco was accorded relief from the decisions rendered by P. L. Board 34 and was permitted to proceed without any binding effect of those awards complicating and confusing its future dealings with other unions.

II.

The District Court properly remanded the Awards of the P. L. Board to that Board within jurisdiction delegated by the Railway Labor Act and as ordered by this Court.

Contrary to the "gross misapplication of this Court's decision in the **Union Pacific** case" as charged by Petitioner in its Petition for a Writ of Certiorari (page 12) the action taken by the District Court when it remanded the awards to the Board for further consideration was in strict compliance with the mandate of this Court in **Transportation-Communication Employees Union v. Union Pacific R. R.**, 385 U. S. 157, 87 S. Ct. 369, 17 L. Ed. 2d 264 (1966). This was the only just and lawful Order which could be entered if the District Court properly classified the issues before the Board as minor disputes. This Court has set out the directive which the District Court meticulously followed in this case in the clearest terms. In **Union Pacific**, supra, the Court discussed the nature of a collective bargaining agreement in the railroad industry and then stated:

> "In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." (385 U. S. 157, l. c. 161.)

It further went on to define the policy behind rendering such Board awards to be the complete, absolute and final settlement of all disputes in a prompt and orderly manner. Justice Black in writing for the majority of the Court, stated:

> "By first ordering the railroad to pay one union and then later, in a separate proceeding, ordering it to pay the other union, without ever determining which union has the right to perform the job and thus without ever prejudicing the rights of the other union, the Board abdicates its duty to settle the entire dispute. Yet this is precisely the kind of merry-go-round situation which the petitioner claims is envisaged by the Act, a procedure which certainly does not 'provide for the **prompt** and **orderly** settlement of **all** disputes . . .,' the purpose for which the Adjustment Board was established. §2 (5). (Emphasis supplied.)" (l. c. 162.)

The final paragraph of the District Court's Opinion requires precisely but no more than was ordered by this Court in **Union Pacific**, supra, and is founded on the same sound principles recognized as the philosophy of the intent of Congress when it created special bodies possessed of expertise necessary to resolve those controversies classically called "minor disputes".

> **Order of Conductors v. Pitney**, 326 U. S. 561 (1946); **Elgin, J. & E. R. Co. v. Burley**, 325 U. S. 711 (1945).

The District Court's obligation and the District Court's duty under the circumstances was to examine and to analyze in order to determine whether or not a prompt, orderly and final disposition had in fact been made by the Board. Its informed conclusion was that the Board had not accomplished its full duty, and the District Court then faced the alternatives of setting aside or remanding. Remand to the Board was the remedy selected.

The fact that the record fails to identify a competing union as making active claim to the work does not serve to relieve a reviewing Court of its duty to require the Board to comply with the requirements of law. In **Brotherhood of Railroad Signalmen v. Southern Ry. Co.**, 380 F. 2d 59 (4 Cir. 1967), cert. den. 389 U. S. 958, the Court also reviewed **Transportation-Communication Employees Union v. Union Pacific R. R. Co.**, 385 U. S. 157, 87 S. Ct. 369, 17 L. Ed. 2d 264 (1966), and similarly remanded for a determination of any other union's interest, holding:

> "The record before us, containing only scant reference to the existence of a competing union and referring not at all to its contract, fails to provide an adequate basis for resolution of the 'entire dispute'."

further:

> "The Supreme Court in **Transportation-Communication** has made known its view that the union's failure to complain will not be deemed sufficient reason for disregarding its contract" (l. c. 65).

Prior to the 1966 amendments to the Railway Labor Act, a court's jurisdiction on judicial review of Board awards was limited either to enforcing or setting aside the awards (45 U. S. C. A., § 153 First (p) prior to June 20, 1966). However, when Congress enacted the amendments in 1966 among other changes was an added alternative given to the courts:

> "The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct." (45 U. S. C. A., § 153 First (q).)

The action taken by the District Court was in strict compliance with the statute and constituted a classic example of the need for and utilization of the remand procedure.

III

The Appellate Court properly held that the remand to the Board ordered by the District Court was not an appealable order because it did not constitute a "final decision."

Judicial review of Board awards accorded by District Courts in accordance with 45 U. S. C. A., § 153 First (q) is in turn made reviewable as provided in §§ 1291 and 1254 of Title 28. The United States Court of Appeals for the 8th Circuit properly held that the remand ordered by the District Court did not constitute that "final decision" which qualifies for appeal in accordance with 28 U. S. C. A., § 1291.

Many standards for determining the true finality of a "final decision" or a "final judgment" have been enunciated by the Courts in analyzing appealability, however all embody the common requirement that there must have been an adjudication on the merits for finality to exist. A guiding pronouncement on this determination was made by this Court in **Catlin v. United States**, 324 U. S. 229, 65 S. Ct. 631, 89 L. Ed. 911 (1945). The Court said:

> "Their right to appeal rests upon § 128 of the Judicial Code. This limits review to 'final decisions' in the District Court. A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. **St. Louis, I. M. & S. R. Co. v. Southern Express Co.**, 108 U. S. 24, 28. * * * The foundation of this policy is not in merely technical conceptions of 'finality.' It is one against piecemeal litigation. 'The case is not to be sent up in fragments. . . .' **Luxton v. North River Bridge Co.**, 147 U. S. 337, 341. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals" (l. c. 233-234).

Catlin is well recognized in the 8th Circuit and was relied on in **Bohms v. Gardner**, 381 F. 2d 283 (8th Cir. 1967). The following analysis is found in that opinion written by Blackmun, C.J.:

> "From this it inevitably follows, we feel, that the present appeal must be dismissed. Although the Secretary made a final administrative decision for purposes of court review under § 205 (g), Cody v. Ribicoff, 289 F. 2d 394, 395 (8 Cir. 1961); Murphy v. Gardner, 379 F. 2d 1 (8 Cir. 1967), no such decision was made at the district court level. And it is district court action which measures our appellate jurisdiction under § 1291. The district court merely vacated the Secretary's decision and remanded the case for reconsideration and, possibly, the reception of additional evidence. It neither granted nor denied the relief the claimant seeks. The adverse agency decision so vacated may of course be reinstated in due course but it may go the other way. Until the Secretary acts on the remand we have no insight as to what his eventual decision will be. Thus, in the words of Catlin v. United States, supra, the litigation had not reached its end on the merits and there is more for the court to do than execute the judgment, or, as Judge Ridge said, in Smith v. Sherman, supra, p. 551 of 349 F. 2d, the district court's action by no means was 'the last word of the law.'"

The identical set of circumstances existed in the present case. Until and unless the Board reconvened and completed its functions neither party had really been hurt and neither party had an order from which it could perfect a valid appeal. Remand orders have long been recognized as possessed of non-appealability character with perhaps the most succinct characterization of the remand order stated by the Appellate Court below in its decision in this case.

"A remand order for further proceedings is not a final decision contemplated by § 1291. Bohms v. Gardner, supra; Marshall v. Celebrezze, 3 Cir., 351 F. 2d 467; Mayersky v. Celebrezze, 3 Cir., 353 F. 2d 89; Stathatos v. Arnold Bernstein S. S. Corp., 2 Cir., 202 F. 2d 525.

"We are convinced that when the law is applied to the facts of this case, the conclusion must follow that the judgments appealed from are not final decisions. The trial court has neither enforced nor denied enforcement of the Board's awards. It has made no final determination of the merits of the controversy and it has not dismissed the action" (419 F. 2d, l. c. 935).

CONCLUSION

Respondent respectfully urges that by no standard is this case worthy of review by this Court. Not only is the decision below correct, but long standing custom and practice of this Court announced with authority and certainty so many times require denial of a Petition for Writ when, as here, the original controversy between the parties has been fully and finally settled by them.

Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted

PAUL R. MOODY
300 Frisco Building
St. Louis, Missouri 63101
Counsel for Respondent

Of Counsel

JOHN E. McCULLOUGH
300 Frisco Building
St. Louis, Missouri 63101

APPENDIX.

APPENDIX A

Joint Suggestion of Mootness and Joint Motion to Vacate the Judgment Below and to Remand the Case to the District Court With a Direction to Dismiss

Come now the Appellants and the Appellee, by their respective counsel, and jointly show to the Court that this case has been settled by agreement of the parties. There remains outstanding the District Court's Order remanding the cause to Public Law Board No. 34 for that Board to take certain specified actions which should not be taken now that the underlying dispute is settled and moot.

Wherefore, the parties jointly move this Court to vacate the judgment below and to remand the action to the United States District Court for the Eastern District of Missouri with a direction to dismiss the action as moot. This is the appropriate procedure. Cf. *United States v. Munsingwear, Inc.*, 340 U. S. 36, 39; *Brotherhood of Locomotive Firemen v. Toledo, P & W R. Co.*, 332 U. S. 748; *Security & Exchange Commission v. Harrison*, 340 U. S. 908; *Howard v. United States*, 340 U. S. 898; *Barnes v. Akron, C. & Y R. Co.*, 348 U. S. 893.

Respectfully submitted,

John H. Haley, Jr., and
Milton Kramer
By John H. Haley, Jr.
Attorneys for Appellants

John E. McCullough and
Paul R. Moody
By Paul R. Moody
Attorneys for Appellee

John H. Haley, Jr.
818 Olive Street
St. Louis, Mo. 63101

Milton Kramer
1625 K Street, N. W.
Washington, D. C. 20006

Paul R. Moody
906 Olive Street
St. Louis, Mo. 63101

December 5, 1969

SUPREME COURT, U. S.

AUG 3 1970

E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 155

TRANSPORTATION-COMMUNICATION DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION

JOHN H. HALEY, JR.
818 Olive Street
St. Louis, Missouri 63101
Counsel for Petitioners

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

TABLE OF CONTENTS

Page

Argument—

I. The question is so important it should be determined by this Court notwithstanding Respondent's argument based on the fact that the issues, as between the parties, are moot 1

II. Respondent's argument, like the decision of the majority of the court below, is based upon inapposite statutes and decisions 5

Conclusion 9

TABLE OF CITATIONS

Cases

Bohms v. Gardner, 381 F. 2d 283 (8th Cir. 1967) 5, 6

Brotherhood of Locomotive Firemen & Enginemen et al v. Chicago, Burlington & Quincy R. Co. et al., 225 F. Supp. 11 (D. D. C. 1963), aff'd on the opinion of the Court below, Brotherhood of Locomotive Firemen & Enginemen v. Certain Carriers, 331 F. 2d 1020 (D. C. Cir. 1964), cert. den. 377 U. S. 918 (1964) 6

Brown Shoe Co. v. United States, 370 U. S. 294 (1962). 8

Brotherhood of Railroad Signalmen of America v. Southern Ry. Co., 380 F. 2d 59 (4th Cir. 1967), cert. denied, 389 U. S. 958 (1967) 4

Brotherhood of Railway Signalmen v. Chicago, Milwaukee, St. P. & P. R. Co., 284 F. Supp. 401 (N. D. Ill. 1968) 4

Brotherhood of Railroad Trainmen v. Central of Georgia Ry. Co., 415 F. 2d 403 (5th Cir. 1969) 4

Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., 353 U. S. 30 (1957) 7

Brotherhood of Railroad Trainmen v. Denver & R. G. W. R. Co., 338 F. 2d 407 (10th Cir. 1964), cert. denied, 380 U. S. 972 (1965) 3

Brotherhood of Railroad Trainmen v. Denver & R. G. W. R. Co., 370 F. 2d 833 (10th Cir. 1966), cert. denied, 386 U. S. 1048 (1967) 3

Brotherhood of Railroad Trainmen v. Harriman and Northeastern Railroad Company, 270 F. Supp. 582 (E. D. Tenn. 1967) 4

Catlin v. United States, 324 U. S. 229 5

Elgin, Joliet & Eastern R. Co. v. Burley, 325 U. S. 711 (1945) 7

Gibson v. Missouri Pacific R. Co. (E. D. Tex. No. 5176), notice of appeal filed July 16, 1970 4

Gillespie v. United States Steel Corp., 379 U. S. 148 (1964) 8

Gunther v. San Diego & Eastern Arizona R. Co., 382 U. S. 257 (1965) 3

Hanson v. Chesapeake & O. Ry., 198 F. Supp. 325 (S. D. W. Va. 1961, 236 F. Supp. 56 (S. D. W. Va. 1964), aff'd, 351 F. 2d 953 (4th Cir. 1965), vacated and remanded, 384 U. S. 211 (1966), rev'd and remanded, 367 F. 2d 134 (4th Cir. 1966), 291 F. Supp. 401 (S. D. W. Va. 1968), vacated and remanded, 412 F. 2d 631 (4th Cir. 1969) 3

Marshall v. Celebreeze, 351 F. 2d 467 (3d Cir. 1965) .. 5, 6

Mayersky v. Celebreeze, 353 F. 2d 89 (3d Cir. 1965) 5

Order of Railway Conductors & Brakemen v. Erie, Lackawana R. Co., 302 F. Supp. 1196 (N. D. Ohio, 1969) 4

Order of Railway Conductors & Brakemen v. Pitney, 326 U. S. 561, rehearing denied, 327 U. S. 814 (1946) 7

Order of Railway Conductors v. Southern Railway Co., 339 U. S. 255 (1950) 7

Slocum v. Delaware, L & W R. Co., 339 U. S. 239 (1950) 7

Smith v. Sherman, 349 F. 2d 547 (8th Cir. 1965) .. 5, 6

Southern Pacific Co. v. Wilson, 378 F. 2d 533 (5th Cir. 1967) 4

Stathatos v. Arnold Bernstein S. S. Corp., 202 F. 2d 525 (2d Cir. 1953) 5, 7, 8

Stewart v. Bishop, 403 F. 2d 674 (8th Cir. 1968) 5, 6

Sweeney v. Florida East Coast Railway Co., 389 F. 2d 113 (5th Cir. 1968) 4

System Federation No. 30, etc. v. Braidwood, 284 F. Supp. 611 (N. D. Ill. 1968) 4

Transportation-Communication Employees Union v. Harriman and Northeastern Railroad Company, 270 F. Supp. 582 (E. D. Tenn. 1967) 4

Washington Terminal Co. v. Boswell, 124 F. 2d 235 (D. C. Cir. 1941), aff'd. by equally divided Court, 319 U. S. 732 (1943) 2

Statutes

5 U. S. C., §§ 701-706 6

9 U. S. C., § 1 et seq. 7

45 U. S. C., § 153, First (m), (o), (p), (q), etc. and Section 153, Second (1970 Supp.) 2, 3, 8

45 U. S. C., § 159 6

Miscellaneous

Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, Eighty-Ninth Congress, Second Session (1966) 2, 3, 4

Hearings before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives, Eighty-Ninth Congress, First Session on H. R. 701, 704 and 706 (1965) 2, 3, 4

National Mediation Board, Thirty-Third Annual Report, June 30, 1967 2

National Mediation Board, Thirty-Fourth Annual Report, June 30, 1968 2

National Mediation Board, Thirty-Fifth Annual Report, June 30, 1969 2

2 U. S. Code Congressional and Administrative News, 89th Congress, 2nd Session, 1966 at 2287 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 155

TRANSPORTATION-COMMUNICATION DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION

I

This Court Should Review the Decision of the Majority of the Court Below in This Case That an Order of a District Court Remanding a Minor Dispute to the National

Railroad Adjustment Board (Hereinafter "NRAB"), or to a Public Law Board (Hereinafter "P. L. Board"), for Which Public Law 89-456 Provided, Is Not Subject to Appellate Review Because It Is Such an Important Question of First Impression in the Administration of the Railway Labor Act, Notwithstanding Respondent's Argument Based on the Fact That the Issues, as Between the Parties, Are Moot.

The importance of the question is evidenced by the fact that more than 2,988 awards per year have been made by the NRAB and P. L. Boards, since the enactment of P. L. 89-456, the Act of June 20, 1966, §§ 1, 2, 80 Stat. 208, 209, now 45 U. S. C. 153, First (m), (o), (p), (q), etc., and Section 153, Second, second paragraph (1970 Supp.). *National Mediation Board*, Thirty-Third Annual Report (1967), Table 9, p. 96; Thirty-Fourth Annual Report (1968), p. 44, Appendix A, pp. 54-60 and Table 9, p. 79 and Thirty-Fifth Annual Report (1969), p. 47, Appendix A, pp. 56-62, Table 9, p. 82. Prior to the enactment of Public Law 89-456 the NRAB made an average of some 1,180 awards per year. *Hearings before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce*, House of Representatives, Eighty-ninth Congress, First Session on H. R. 701, 704 and 706, Table 9, pp. 6-7 (1965); *Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare*, United States Senate, Eighty-ninth Congress, Second Session, p. 31 (1966).

Notwithstanding the state of the law for the 30 years prior to the enactment of P. L. 89-456 provided for judicial trial *de novo* of the merits of minor disputes and did not provide for judicial review of awards of the NRAB, *Washington Terminal Co. v. Boswell*, 124 F. 2d 235 (D. C. Cir. 1941), *aff'd by equally divided Court*, 319 U. S. 732

(1943), at least thirty-seven actions were commenced under subsection (p) of Section 3, First of the Act to enforce awards of the NRAB; in twenty-five of those cases the dispute was judicially reviewed on its merits, in twenty-three cases awards were denied enforcement and seven were enforced; *Hearings Before the Subcommittee of the House of Representatives, supra,* pp. 8-10 and *Hearings Before the Subcommittee of the Senate, supra,* pp. 22-23.

With the increased number of Awards by the NRAB and P. L. Boards since the enactment of P. L. 89-456, which denies judicial review of the merits of minor disputes but provides judicial review of awards not theretofore subject to review and jurisdiction to remand minor disputes to such boards, the correctness of the decision by a majority of the three Judges of the Court below in this case—that a decision of a District Court remanding a minor dispute to the NRAB or a P. L. Board is not subject to appellate review—reasonably may be expected to become increasingly important.

The increase in litigation since the decision of this Court in *Gunther v. San Diego & Eastern Arizona R. Co.*, 382 U. S. 257 (1965) and the enactment of P. L. 89-456 appears from *Brotherhood of Railroad Trainmen v. Denver & R. G. W. R. Co.*, 338 F. 2d 407 (10th Cir. 1964), *cert. denied*, 380 U. S. 972 (1965); *Brotherhood of Railroad Trainmen v. Denver & R. G. W. R. Co.*, 370 F. 2d 833 (10th Cir. 1966), *cert. denied*, 386 U. S. 1018 (1967); *Hanson v. Chesapeake & O. Ry.*, 198 F. Supp. 325 (S. D. W. Va. 1961), 236 F. Supp. 56 (S. D. W. Va. 1964), *aff'd*, 351 F. 2d 953 (4th Cir. 1965), *vacated and remanded*, 384 U. S. 211 (1966), *rev'd and remanded*, 367 F. 2d 134 (4th Cir. 1966), 291 F. Supp. 401 (S. D. W. Va. 1968), *vacated and remanded*, 412 F. 2d 631 (4th Cir. 1969); *Brotherhood*

of Railroad Signalmen of America v. Southern Ry. Co., 380 F. 2d 59 (4th Cir. 1967), *cert. denied*, 389 U. S. 958 (1967); *Southern Pacific Co. v. Wilson*, 378 F. 2d 533 (5th Cir. 1967); *Sweeney v. Florida East Coast Railway Co.*, 389 F. 2d 113 (5th Cir. 1968); *Brotherhood of Railroad Trainmen v. Central of Georgia Ry. Co.*, 415 F. 2d 403 (5th Cir. 1969); *Transportation-Communication Employees Union v. Harriman and Northeastern Railroad Company*, 270 F. Supp. 582 (E. D. Tenn. 1967).

The decision by the Court below in this case—that a judgment of a District Court remanding a minor dispute to the NRAB is not subject to appellate review—is being relied upon by appellee in *United Transportation Union v. Illinois Central R. Co.*, No. 18,033 in the Court of Appeals for the Seventh Circuit, as noted at pp. 11-12 of the Petition in this case, which is awaiting argument and decision. It may also arise in *Gibson v. Missouri Pacific R. Co.* (E. D. Tex. No. 5176), *notice of appeal filed* July 16, 1970. Other District Courts have remanded minor disputes to the NRAB or P. L. Boards and apparently no appeal has been taken. *Brotherhood of Railway Signalmen v. Chicago, Milwaukee, St. P. & P. R. Co.*, 284 F. Supp. 401 (N. D. Ill. 1968); *System Federation No. 30, etc. v. Braidwood*, 284 F. Supp. 611 (N. D. Ill. 1968); *Order of Railway Conductors & Brakemen v. Erie, Lackawana R. Co.*, 302 F. Supp. 1196 (N. D. Ohio, 1969).

The average number of cases arising since *Gunther* and P. L. 89-456 has thus been at least *three* per year, as compared to the average of *less than one* case per year arising during the 30 years preceding *Gunther* and P. L. 89-456. *Hearings Before the Subcommittee of the House of Representatives, supra*, pp. 8-10 and *Hearings Before the Subcommittee of the Senate, supra*, pp. 22-23.

II

Respondent's Argument That the Court Below Correctly Held That a Decision of a District Court Remanding a Minor Dispute to the NRAB or a P. L. Board, Is Not Subject to Appellate Review, Is Based Upon a Misconception of the Nature of an Action Under the Railway Labor Act to Enforce or Review Such Awards and Upon Inapposite Decisions.

Respondent's misconception of the nature of an action under the Railway Labor Act to enforce or review awards of the NRAB, like the misconception of the majority of the Court below, is evidenced by the decisions relied upon by the Court below (Ptn., p. A-19) and by Respondent (Br., pp. 10-12).

Respondent relies upon *Catlin v. United States*, 324 U. S. 229 and *Bohms v. Gardner*, 381 F. 2d 283 (8th Cir. 1967) as did the Court below (Ptn., p. A-19; Respondent's Br., pp. 10-11). The Court below also relied upon *Stathatos v. Arnold Bernstein S. S. Corp.*, 202 F. 2d 525 (2d Cir. 1953); *Marshall v. Celebreeze*, 351 F. 2d 467 (3d Cir. 1965); *Mayersky v. Celebreeze*, 353 F. 2d 89 (3d Cir. 1965); *Smith v. Sherman*, 349 F. 2d 547 (8th Cir. 1965); *Stewart v. Bishop*, 403 F. 2d 674 (8th Cir. 1968), (Ptn., p. A-19).

The *Catlin* case was an action for the condemnation of land under the War Purpose Act of August 18, 1890, and the Declaration of Taking Act of February 26, 1931, in which, on the same day the petition for condemnation was filed, the Court, upon the deposit by the Secretary of War of the estimated value of the land, entered an *ex parte* order vesting title to the land in the Government. This Court held that the *ex parte* order was not a final judgment subject to appellate review, since the question of

the sufficiency of the compensation for the land remained to be determined.

Stewart v. Bishop was a *habeas corpus* proceeding in which a majority of the Court below held it did not have jurisdiction of an appeal from an Order of a District Court directing a hearing by a State Court with respect to the voluntariness of a confession which had been used in a criminal case in the State Court, because no appeal had been taken from an order of the District Court dismissing the action after the State had complied with the interlocutory order for the voluntariness hearing.

Smith v. Sherman was an interpleader action for the determination of the respective interests of several persons in the assets of a defunct business, upon which the Trustee in bankruptcy also had asserted claims, in which the Court of Appeals held it was without jurisdiction of appeals from certain interlocutory orders, since there were still many unresolved issues in the interpleader action.

The *Marshall v. Celebreeze, Mayersky v. Celebreeze* and *Bohms v. Gardner* cases were based upon and subject to the Administrative Procedure Act, 5 USC 701-706, which is inapplicable to judicial review of arbitration awards under the Railway Labor Act. 5 USC Section 701 and *Brotherhood of Locomotive Firemen & Enginemen et al. v. Chicago, Burlington & Quincy R. Co. et al.*, 225 F. Supp. 11 (D. D. C. 1963), *aff'd on the opinion of the Court below, Brotherhood of Locomotive Firemen & Enginemen v. Certain Carriers*, 331 F. 2d 1020 (D. C. Cir. 1964), *cert. den.* 377 U. S. 918 (1964); in that case the Court considered the extent of judicial review under Section 9 of the Railway Labor Act, 45 USC 159, which is the extent of judicial review of awards of the NRAB and P. L. Boards which was intended under P. L. 89-456 (**2 U. S. Code Congressional & Administrative News**, 89th Congress, 2nd Session, 1966 at 2287).

The *Stathatos* case was an action for damages for an alleged breach of contract of which the District Court had initial jurisdiction. The contract contained a provision for the arbitration of disputes arising under it and was subject to the provisions of the United States Arbitration Act, 9 USC 1, et seq. (which, in terms, is not applicable to railroad employees, 9 USC 1, 2). The Court retained jurisdiction of the action, under the provisions of the Arbitration Act, to determine the validity of the arbitration of all or part of the issues which were subject to arbitration and for the resolution of any other issues not subject to arbitration.

Unlike cases such as *Stathatos*, Courts have never had initial original jurisdiction of minor disputes arising under collective agreements subject to the Railway Labor Act, such as the Court had of the dispute in *Stathatos* in which the contract provided for arbitration which was subject to the United States Arbitration Act, and continuing jurisdiction of the Court over the arbitration. Courts have never had initial original jurisdiction of minor disputes arising under the Railway Labor Act, notwithstanding such disputes are based on an alleged breach of a collective agreement and are subject to compulsory arbitration by the National Railroad Adjustment Board or Public Law Boards. *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, 724-728 (1945); *Order of Railway Conductors & Brakemen v. Pitney*, 326 U. S. 561, *rehearing denied*, 327 U. S. 814 (1946); *Slocum v. Delaware, L & W R. Co.*, 339 U. S. 239 (1950); *Order of Railway Conductors v. Southern Railway Co.*, 339 U. S. 255 (1950); *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30 (1957).

Under the Railway Labor Act Courts have no initial original jurisdiction of any dispute which is subject to arbitration. Instead, under the Railway Labor Act Courts

have jurisdiction to determine the validity of arbitration awards only after such awards have been made either by the NRAB or by a P. L. Board under the provisions of Section 3, First, of the Railway Labor Act or by an arbitration board established under Sections 7, 8 and 9 of the Act. Arbitration, under the Railway Labor Act, is not, as in *Stathatos*, a method for resolving issues of which the Court otherwise had jurisdiction to try and determine.

Contrary to the opinion of the majority of the Court below and Respondent's argument (Br. 10-12), a decision of a District Court remanding a minor dispute to the NRAB or a P. L. Board, should be treated as a final judgment subject to appellate review under *Gillispie v. United States Steel Corp.*, 379 U. S. 148, 152-154 (1964) and *Brown Shoe Co. v. United States*, 370 U. S. 294 (1962) because of the practical effect and consequences of such a decision, as shown in the petition and the last sentence of subsection (q) of Section 3, First, 45 U. S. C. 153, First (q) (1970 Supp.), which Respondent and the Court below practically ignore, and which obviously was enacted to insure that such a decision by a District Court would be subject to appellate review prior to permitting the practical consequences which would result from treating it as the Court below did and as Respondent argues should be permitted.

The only jurisdiction in addition to that which the Courts theretofore had and which was continued by P. L. 89-456 was jurisdiction to set aside such awards "in whole or in part" and "to remand the proceedings." In conferring such additional jurisdiction, P. L. 89-456 expressly provided (45 U. S. C. 153, First (p) and (q)) that the

> "..... district courts are empowered to enforce or set aside" [an award of the NRAB]

and that:

> "[t]he court shall have jurisdiction to affirm [the award], or to set it aside, *in whole or in part* or it may *remand* the proceeding" [to the Board] (emphasis supplied),

and further, that:

> "[t]he judgment of the Court shall be subject to review as provided in Sections 1291 and 1254 of Title 28."

CONCLUSION

For the reasons stated in the Petition and in this Reply Brief the writ of certiorari should be granted.

Respectfully submitted

JOHN H. HALEY, JR.
818 Olive Street
St. Louis, Missouri 63101
Counsel for Petitioners

July 31, 1970

LIBRARY
UPREME COURT, U. S.

FILED
SEP 9 1970
F. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 155

TRANSPORTATION-COMMUNICATION DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF

Of Transportation-Communication Division, Brotherhood of Railway, Airline and Steamship Clerks, Etc., Et Al., Petitioners

JOHN H. HALEY, JR.
818 Olive Street
St. Louis, Missouri 63101
Counsel for Petitioners

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

INDEX

	Page
Supplemental Brief	1
Conclusion	5
Appendix A	A-1
Appendix B	A-2
Appendix C	A-7
Appendix D	A-13
Appendix E	A-15

Cases Cited

Gibson v. Thompson, Trustee, certiorari granted, case reversed and remanded per curiam, 355 U. S. 18 (1957), rehearing denied, 355 U. S. 900 (1957)	2
Thompson v. Gibson, 290 S. W. 2d 305 (1956), 298 S. W. 2d 97 (1957)	2
Thompson v. Gibson, 310 S. W. 2d 564 (1958)	2

Statutes and Rules Cited

Federal Rules of Civil Procedure:	
Rule 73	4
Rule 5	4
28 USC, 1254	2, 4
28 USC, 1291	2, 4
28 USC, 1292 (b)	4
45 USC, 153 First (q) (1970 Supp.)	2, 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 155

TRANSPORTATION-COMMUNICATION DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,
Petitioners,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF

Of Transportation-Communication Division, Brotherhood of Railway, Airline and Steamship Clerks, Etc., Et Al., Petitioners

The importance of this Court reviewing the decision of the Court below in this case is further demonstrated by additional proceedings in *Gibson v. Missouri Pacific R.*

Co., to which reference was made at page 4 of Petitioner's Reply Brief, which have come to the attention of counsel for petitioner since that brief was filed.

The first question presented in this case (Ptn. p. 2)—whether a decision of a District Court remanding a minor dispute to the National Railroad Adjustment Board is subject to appellate review by a Court of Appeals under the provisions of Section 3, First (q) of the Railway Labor Act, 45 USC 153 First (q) (1970 Supp.) and 28 USC 1254 and by this Court under Section 3, First (q) of the Railway Labor Act and 28 USC 1291—is now pending before the Court of Appeals for the Fifth Circuit in the *Gibson* case in which the Court of Appeals for the Fifth Circuit has not entered any order either assuming or denying jurisdiction (App. A-1 to A-7) as well as in *United Transportation Union v. Illinois Central R. Co.*, in the Court of Appeals for the Seventh Circuit, to which reference was made at pages 11-12 of the Petition filed in this case; that case is set for oral argument on September 25, 1970.

In the *Gibson* case an employee of the New Orleans, Texas & Mexican Railroad Company recovered a judgment under the Federal Employer's Liability Act for damages for personal injuries as appears from *Thompson v. Gibson*, 290 S. W. 2d 305 (1956); 298 S. W. 2d 97 (1957); *Gibson v. Thompson, Trustee, certiorari granted, case reversed and remanded per curiam*, 355 U. S. 18 (1957); *rehearing denied*, 355 U. S. 900 (1957) and *Thompson v. Gibson*, 310 S. W. 2d 564 (1958), App. A-3.

Thereafter, on October 31, 1963, the National Railroad Adjustment Board, First Division, made an award denying Gibson's grievance for reinstatement to employment by the railroad on the ground he was estopped from maintaining such grievance by reason of the allegations and

proof made in his personal injury action and on March 18, 1964 rendered an interpretation of that award (App. A-4).

On June 1, 1966, more than two years after the award and interpretation were made by the National Railroad Adjustment Board, First Division, Gibson commenced an action in the United States District Court for the Eastern District of Texas, Beaumont Division (App. A-4, A-5), to review and set aside the award and the interpretation of the award by the National Railroad Adjustment Board, First Division, notwithstanding the Act did not, at that time, provide for actions to review such awards (*Washington Terminal Co. v. Boswell*, cited at page 2 of Petitioner's Reply Brief herein) and sub-section (q) of Section 3 First of the Act (45 USC 153, First (q) at that time provided that actions to enforce awards of the Board ". . . shall be begun within two years . . ."; which provision was re-enacted as sub-section (r) of Section 3, First of the Act, on June 20, 1966 as part of Public Law 89-456, which also provided in sub-section (q) of Section 3, First for actions to *review* awards of the National Railroad Adjustment Board, 45 USC 153, First (q), (r), (1970 Supp.), (App. A-4, A-5).

The District Court, ignoring the contention of the railroad with respect to the statute of limitations (App. A-5), on June 17, 1970 remanded the dispute to the National Railroad Adjustment Board with instructions "to make new and appropriate findings as to the nature and extent of Gibson's present disability, if any, to work as a locomotive engineer and as to whether he has been wrongfully withheld from service in violation of the contract between the union and the railroad" (App. A-7 to A-12).

On July 10, 1970 the District Court granted the railroad's motion to permit the railroad to appeal from the decision remanding the dispute as an interlocutory decision under the provisions of 28 USC 1292 (b) because

"there may be a question whether [the District Court's decision] is an appealable order" (App. A-13 to A-14).

The question whether the District Court's decision was an appealable order existed by reason of the decision of the Court below in this case and was the occasion for the railroad's motion to permit an appeal from that decision as an interlocutory decision under the provisions of 28 USC 1292 (b), notwithstanding the District Court considered its decision to be subject to appellate review (App. A-2 to A-3, A-13 to A-14).

On July 16, 1970, the railroad filed the usual notice of appeal under the provisions of 28 USC 1254 and Rule 73 of the Federal Rules of Civil Procedure from the decision of the District Court on June 17, 1970 as amended by its order of July 10, 1970 (App. A-15).

Also, on July 17, 1970 the railroad, under the provisions of 28 USC 1292 (b) and Rule 5 of the Federal Rules of Appellate Procedure, filed in the United States Court of Appeals for the Fifth Circuit, its petition for permission to appeal from the decision of the District Court as an interlocutory order and to consolidate such appeal with the appeal it had taken "as of right" under Section 3, First (q) of the Railway Labor Act (45 USC 153, First (q) (1970 Supp.)) and 28 USC 1291 (App. A-1 to A-14).

It is therefore apparent that the resolution by this Court of the question whether a decision of a District Court remanding a minor dispute to the National Railroad Adjustment Board is subject to appellate review as a matter of right under the provisions of subsection (q) of Section 3, First of the Railway Labor Act, 45 USC 153, First (q) (1970 Supp.) and the provisions of 28 USC 1291 and 1254 could well avoid a Petition for a Writ of Certiorari to review a decision which may be made by the Court of Ap-

peals for the Fifth Circuit in the *Gibson* case or by the Court of Appeals for the Seventh Circuit in *United Transportation Union v. Illinois Central R. Co.*

CONCLUSION

For the reasons stated in the Petition and Petitioner's Reply Brief and in this Supplemental Brief, the Writ of Certiorari should be granted.

Respectfully submitted

JOHN H. HALEY, JR.
818 Olive Street
St. Louis, Missouri 63101
Counsel for Petitioners

September 4, 1970.

APPENDIX A

United States Court of Appeals
Fifth Circuit

Office of the Clerk

July 17, 1970

Re: Misc. No. 1774 Missouri Pacific Railroad Co. vs. J. L. Gibson

(1) Petition for permission to appeal from an interlocutory order.

(2) July 24, 1970.

Dear Sir:

I am authorized by this Court to advise that the above (1) has been received and filed, and under the rules and practice of this Court will be presented for ruling without oral argument on the date shown in column (2) above, together with any response or opposition that may be filed by opposing counsel by that date.

Very truly yours

EDWARD W. WADSWORTH
Clerk

APPENDIX B

In the United States Court of Appeals
Fifth Circuit

No. .....

Missouri Pacific Railroad Company,
Appellant,

vs.

J. L. Gibson,
Appellee.

From the United States District Court,
Eastern District of Texas,
Beaumont Division

RAILROAD'S PETITION FOR PERMISSION TO APPEAL AS FROM AN INTERLOCUTORY ORDER

To the Honorable Court of Appeals:

Now comes Missouri Pacific Railroad Company, hereinafter designated the Railroad, and files this, its Petition for leave to appeal under 28 U. S. C., Sec. 1292(b) and Rule 5 of the Rules of Appellate Procedure, and as grounds therefor, shows to the Court the following:

I. Preliminary Statement

On June 1, 1966, J. L. Gibson, as Plaintiff, instituted in the United States District Court for the Eastern District of Texas, Beaumont Division, a certain Civil Action, designated Civil Action No. 5176, against Missouri Pacific Railroad Company, a corporation, as Defendant; and this suit remained pending until June 17, 1970, on which

date the said Court (Hon. Joe J. Fisher, Judge) entered its Memorandum Opinion and Order, a true copy of which is appended hereto as Exhibit A. Thereafter, the said Court amended that Order by an Order entered on July 10, 1970, a true copy of which is appended hereto as Exhibit B. The Railroad believes that the said Order, so amended, is a final judgment, which is appealable as of right under Sec. 1291 of Title 28 of the U. S. Code, and the Railroad has given Notice of Appeal and made bond in the usual manner, for an appeal as of right from those orders. However, it is felt that some question may exist about this because of the different opinion expressed by the Court of Appeals for the 8th Circuit in the case of *Transportation-Communication Division—Brotherhood of Railway, Airline and Steamship Clerks, etc. v. St. Louis-San Francisco Ry. Co.*, 419 F. (2) 922 (1970). In view of this Court's own precedent in the case of *Southern Pacific v. Wilson*, 378 F. (2) 533 (5th Cir. 1967), the Railroad is also seeking permission to take an interlocutory appeal, from the same orders, under Sec. 1292(b) and Appellate Rule 5, in this manner, in an effort to make doubly sure that its appeal will in fact be accepted and entertained, under one section or the other. The Court is requested to allow the interlocutory appeal under Section 1292(b), and consolidate it with the appeal as of right under Section 1291.

II. Statement of Facts Necessary to an Understanding of the Controlling Questions of Law

Plaintiff Gibson, who last worked for Defendant Railroad on January 5, 1951, recovered a judgment against the Railroad for damages for an injury suffered on December 5, 1950. His suit for personal injuries is reported as follows: [as stated in the body of this Brief].

* * * * * * *

The Railroad paid the judgment on March 17, 1958, and shortly thereafter, on July 1, 1958, Plaintiff Gibson demanded that the Railroad put him back to work. The Railroad refused to do so, however, and he has never resumed work for Defendant Railroad. He made a grievance over that, under the collective bargaining agreement, and the Railroad defended itself by contending that he is estopped to deny that he is permanently disabled for railroad work because he prosecuted to successful conclusion a claim of permanent disability, and he collected in full from the Railroad the amount of money that the Court had assessed in the suit which he brought himself for that purpose. The First Division of the NRAB, by its Award No. 20369, dated October 31, 1963, and its Interpretation thereof, dated March 18, 1964, upheld the Railroad's contention in this respect, but held that the Railr road should continue to carry him on the posted seniority lists, thus preserving his eligibility for retirement benefits. Plaintiff Gibson's name is being carried on the seniority list with a notation "Disabled."

On April 23, 1965, Plaintiff Gibson filed suit in the State Court in Anderson County, Texas (at Palestine, Texas) against his Union and its General Chairman, L. D. Johnson, alleging that they had intentionally caused him to lose his employment with the Railroad and his right to enforce his rights against the Railroad, and seeking to collect damages for this from them. On March 31, 1966, without a full trial on the merits, the State Court rendered a summary judgment that Plaintiff Gibson take nothing by his suit against his Union and its General Chairman; and thereupon plaintiff Gibson took an appeal to the Texas Court of Civil Appeals at Tyler.

Meanwhile, pending his appeal in the State Courts, Plaintiff Gibson filed the present suit in Federal Court on June 1, 1966, to review and set aside the Award of the

N. R. A. B., which had been rendered on October 31, 1963. However, it was not until a few weeks later, on June 20, 1966, that House Resolution 706, authorizing such a suit, was actually approved as Public Law 89-456.

On March 30, 1967, the Texas Court of Civil Appeals at Tyler, in *Gibson v. Johnson*, 414 S. W. (2) 235, upheld the decision of the State District Court.

* * * * * * *

Plaintiff Gibson then applied to the Supreme Court of Texas for a Writ of Error, but his application was refused on July 26, 1967.

* * * * * * *

Thereafter, Plaintiff Gibson petitioned the Supreme Court of the United States for a Writ of Certiorari, and that petition was denied on March 4, 1968 [*Gibson v. Johnson*, 300 U. S. 946].

In the present suit, which was not filed until June 1, 1966, to set aside an Award rendered in 1963, the Defendant Railroad pleaded numerous defenses, including the two-year statutes of limitation. One of these statutes was Sec. 153, First, (q) of Title 45 of the U. S. Code, until June 20, 1966, and became Sec. 153, First, (r) on and after June 20, 1966, by virtue of Public Law 89-456.

* * * * * * *

The District Court has made no express finding that these statutes do not apply, but evidently so concluded; because it proceeded to entertain the suit and grant relief without regard to any bar created by those statutes.

* * * * * * *

V. Reasons Why an Immediate Appeal May Materially Advance the Termination of the Litigation

The District Court's Opinion and Order (Exhibit A) does not permit the N. R. A. B., after taking additional evidence, to again decide that Plaintiff Gibson is estopped to deny that he is permanently disabled from Railroad work. It requires the Board to make a different disposition of the case by determining the nature and extent of his disability as of some future date. This would evidently require the N. R. A. B. to institute lengthy new procedures, which might very well result in three separate medical examinations, and a sort of three-doctor medical arbitration, merely in order to determine the nature and extent of Plaintiff Gibson's actual disabilities, when those procedures would be entirely unnecessary if the previous award is ultimately to be upheld, whenever an appeal can be taken according to law.

Conclusion and Prayer

Wherefore, premises considered, the Railroad requests that it be granted permission to take an interlocutory appeal, under Section 1292(b), and Appellate Rule 5, from the Memorandum Opinion and Order (Exhibit A), as amended (Exhibit B), and that such appeal be consolidated with its appeal as of right under Section 1291 and Appellate Rule 4.

* * * * * * *

APPENDIX C

EXHIBIT A

In the District Court of the United States
For the Eastern District of Texas
Beaumont Division

J. L. Gibson,
Plaintiff,
vs.
Missouri Pacific Railroad Company,
Defendant.
} Civil No. 5176.

* * * * * * *

Memorandum Opinion and Order

This case arises out of a controversy that is nearly twenty years old. The plaintiff, J. L. Gibson, became an employee of the defendant, Missouri Pacific Railroad Company, in 1927, and held the position of locomotive engineer when, on December 5, 1950, he suffered personal injuries while in the course of his employment. This incident was the basis of a suit for damages pursuant to the Federal Employers' Liability Act, 45 U. S. C., § 51, et seq., which was filed in the District Court of Harris County, Texas, in December of 1952. Upon the trial of that case, Gibson recovered a judgment of $32,500.00, plus interest. There ensued a series of appeals culminating some five years later in a sustention of Gibson's claim by the United States Supreme Court. The judgment with accumulated interest was finally paid on March 17, 1958.

Subsequently, on July 1, 1958, Gibson requested that Missouri Pacific return him to work as a locomotive en-

gineer, which request was refused. He then instituted a grievance proceeding in accordance with the Rules and Working Conditions Agreement which, pursuant to the provisions of the Railway Labor Act, 45 U. S. C., § 151, et seq., was in effect between Missouri Pacific and Gibson's union, the Brotherhood of Locomotive Engineers. Gibson claimed that he should be returned to service and paid for all time lost since July 1, 1958. As is customary in disputes of this nature, the case was at all times handled by union officials. Procedures for settlement of grievances "on the property" were exhausted to no avail, and, as provided for by the Act, the union submitted the unresolved dispute to the appropriate division of the National Railroad Adjustment Board.

At this point Missouri Pacific interposed the objection that the case was not timely filed according to the rules of the Board, and this question was severed from the basic controversy for determination by a Special Board of Adjustment. A referee was appointed to sit with the Special Board in order to break a deadlock between the union and carrier representatives, and the decision was that the dispute had not been timely filed. The effect of this determination under NRAB rules was to bar Gibson's claim for back pay but not to deprive the Board of jurisdiction to determine whether the employee had been wrongfully denied a return to service.

The remaining portion of the dispute was then taken up by the First Division of the Board. It was required that another referee be appointed to cast a deciding vote. The Division found that the Railroad was wrong in terminating Gibson's employment and should continue to carry him on the posted seniority lists, thus preserving his eligibility for retirement benefits. However, the Division declined to order a return to service. Referring

to Gibson's FELA suit against Missouri Pacific, the award found that,

> "Claimant technically has not been discharged by the carrier but has been paid in advance what the court found to be due him for being permanently deprived of his work."

The position thus taken by the Division was that, having prosecuted to successful conclusion a claim of permanent disability, Gibson is now estopped to assert his ability to return to work for the same employer.

* * * * * * *

Gibson has now brought this action under 45 U. S. C., § 153 (g), seeking to have this Court set aside the NRAB award.

* * * * * * *

Basically what Gibson contends is that the Board has mishandled his claim. He contends that his case is essentially a disciplinary case in that it arose out of his claim that the Railroad had discharged him as punishment for prosecuting his FELA suit. The labor contract calls for two types of arbitration, disciplinary and medical. Gibson contends that this dispute was not handled according to either procedure. If it was a medical case, the Board could not arbitrarily, without prescribed medical arbitration, decide that Gibson was a disabled or unsafe employee. If it was a disciplinary case, then Gibson contends that the Board's finding that his employment relationship was improperly terminated by the Railroad entitles him to a decree implementing his right to return to work. Plaintiff argues that the Railroad has accomplished by this "improper" award what it could not do under federal law and the relevant labor contravts (sic): punishment of an employee for pursuing his FELA claim against his employer.

* * * * * * *

Plaintiff argues, however, that there is no basis in fact or law for application of estoppel in this case because Gibson realized only a limited recovery in his FELA suit "which would have no relevance to the amount recoverable for total and permanent disability." This contention is not without substance. The First Division had before it evidence that Gibson's earning capacity, amounting to $6,000.00 per year, as measured against a verdict of only $32,500.00, would indicate that the jury only awarded lost earnings for a period of about five years of his life. Furthermore, when it is considered that there was also a claim for pain and suffering, past and future, the award would certainly not seem to reflect a determination of total and permanent disability. An interpretation of Gibson's award was issued by the First Division at the Union's request. The Referee's opinion stated as follows:

> "3. It was the opinion of the Referee that termination of the claimant's employment relationship was not proper since his name was retained on the seniority lists; but it was not intended to put the claimant back on the engine or return him to engine service as it was felt his testimony and that of expert medical witnesses proved that such would be unwise, and the award so held."

The "testimony" referred to was obviously that adduced at Gibson's FELA trial, since none was taken in the NRAB proceedings.

The position thus taken by the First Division is that Gibson is bound by testimony offered at his trial to the effect that he was permanently disabled from railroading.

* * * * * * *

It is a sound principle that an employee is estopped to assert a right to return to work after pursuing an FELA claim in which he holds out his inability to work and re-

covers a large sum of money in satisfaction of his claim; but when the recovery is nominal or unsubstantial, the jury's purpose may be ambiguous, or it may be clear as a matter of reason that compensation for serious, long-term injury was not contemplated. The doctrine of estoppel was not intended to bind a litigant to a position not successfully maintained. Under the construction of the estoppel doctrine endorsed by the First Division, an employee would in effect forfeit all rights under his labor contract by the filing of an FELA action against his employer.

* * * * * * *

We think that under the facts of this case the First Division's summary disposition of Gibson's claim by application of the bar of estoppel was clearly arbitrary. The verdict of the jury rendered at Gibson's FELA trial is ambiguous on its face. Gibson has not received a medical examination for the benefit of this record in eighteen years. There is absolutely nothing in the record to justify a finding that this employee is permanently disabled from railroading.

* * * * * * *

In the case at bar there has been no decision on the merits with respect to Gibson's claim that he had been wrongfully removed from service. There has been only summary disposition of the claim upon the theory that it is barred upon its face by estoppel.

* * * * * * *

A controversy arising under labor contracts in effect pursuant to the Railway Labor Act or other labor legislation calls for an adjustment of the rights and interests of the parties in the light of relevant considerations of public policy. The Congress has for this reason provided for disposition of these disputes by a quasi-judicial body. The NRAB is charged by statute with the responsibility of

adjusting the rights of the parties to a dispute within its jurisdiction; this Court has the responsibility to insure that this is done within the framework of the statute and of underlying public policy. We think that that policy is frustrated if we permit the Board to dispose of these disputes in such summary manner as was employed here. Gibson had a right to pursue his FELA remedies. He also had a right to enjoy the benefits and immunities of his labor contract. Congress did not intend that these rights should be mutually exclusive. For the Railroad to discharge Gibson out of retribution would be a clear contravention of federal law. We do not prejudge the merits of the controversy, we simply find that on this state of the record the First Division's determination that Gibson is permanently disabled from railroading is arbitrary and without basis in reason or fact.

* * * * * * * *

We hold that a District Court has jurisdiction to set aside an award of the National Railroad Adjustment Board which is clearly arbitrary as being without foundation in reason or fact, and upon that basis we set aside the award of the First Division and remand this cause to it with instruction to make new and appropriate findings as to the nature and extent of Gibson's present disability, if any, to work as a locomotive engineer and as to whether he has been wrongfully withheld from service in violation of the contract between the Union and the Railroad.

It Is So Ordered.

Entered this 17th day of June, 1970.

* * * * * * * *

APPENDIX D

EXHIBIT B

J. L. Gibson,
Plaintiff,
vs.
Missouri Pacific Railroad Company,
Defendant.
Civil Action.
No. 5176.

Order Amending Memorandum Opinion and Order

On this, the 10th day of July, 1970, the Court being of the opinion that the Court's Memorandum Opinion and Order of June 17, 1970, in the above cause, is an appealable, final order, but it appearing to the Court that there may be a question as to whether same is an appealable order, and the defendant having orally moved the Court for the entry of an order permitting an interlocutory appeal from such order under the provisions of 28 U.S.C. § 1292 (b), and it appearing to the Court that the said Memorandum Order is an appealable order, upon reconsideration of the matter, and being fully advised in the premises, the Court, here and now, upon its own motion, amends the Court's Memorandum Opinion and Order of June 17, 1970, in the above cause:

It Is Hereby Ordered that the Court's Memorandum Opinion and Order are hereby amended to include the following paragraphs in addition to all paragraphs contained in the Memorandum Opinion and Order as originally filed:

The Court is of the opinion that the Memorandum Opinion and Order herein involves controlling questions of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from such order may materially advance the ultimate termination of the litigation; and being of the opinion that leave should be granted for such an interlocutory appeal from such order:

It Is, Therefore, Further Ordered that leave be, and the same is hereby granted unto the Defendant to appeal from such order in accordance with the provisions of 28 U. S. C. § 1292 (b), and no further proceeedings will be had in this cause in this Court until such appeal shall have been terminated finally by the appellate court to which such appeal may be taken.

Thereupon, the Defendant, Missouri Pacific Railroad Company, upon being granted leave to take the interlocutory appeal, then and there in open Court duly gave notice of appeal to the United States Court of Appeals in and for the Fifth Circuit, which said notice is here and now entered of record.

Entered this 10th day of July, 1970.

* * * * * * *

APPENDIX E

J. L. Gibson,

Plaintiff,

vs.

Missouri Pacific Railroad Company,

Defendant.

Civil Action. No. 5176.

NOTICE OF APPEAL

Notice Is Hereby Given that Missouri Pacific Railroad Company, Defendant in the above-entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Memorandum Opinion and Order entered in this action on the 17th day of June, 1970, as amended by an order entered in this action on July 10, 1970.

This 16 day of July, 1970.

* * * * * * *